

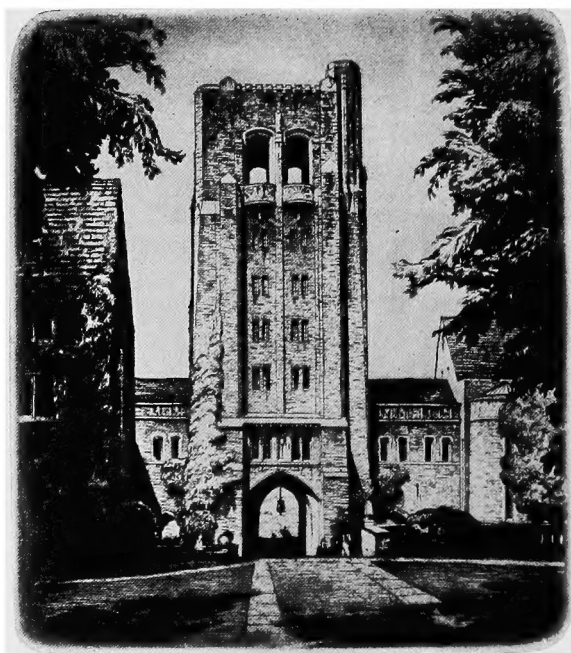


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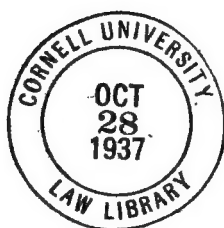
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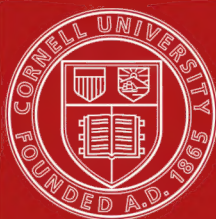
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COMMENTARIES
ON THE
LAW OF INFANCY,
INCLUDING
GUARDIANSHIP AND CUSTODY OF INFANTS,
AND THE
LAW OF COVERTURE,
EMBRACING
DOWER MARRIAGE AND DIVORCE,
AND THE
STATUTORY POLICY OF THE SEVERAL STATES
IN RESPECT TO
HUSBAND AND WIFE.

By RANSOM H. TYLER,
COUNSELOR AT LAW.

ALBANY:
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P R E F A C E .

THIS treatise upon the Law of Infancy and Coverture has been prepared from a conviction that there was a necessity for such a work. It is now over fifty years since Judge Reeve issued his valuable treatise upon the domestic relations, and in the interim very great changes have occurred in the rules and principles by which these relations are governed. Especially has the reformer been at work with a relentless hand, in that branch of jurisprudence which pertains to the rights and duties of married women, and it is but recently that the subject has been systematized and wrought into permanent shape. Several English works, and one or two American treatises, upon the law of husband and wife, and marital rights, have been issued within the last fifty years, and some within the last ten years ; but it is believed that none of them occupy the entire field, or supersede the necessity of a new work.

Infancy and coverture may be regarded as cognate subjects, and it seems eminently proper that they be treated together. The common law disabilities of both infants and married women are in many respects quite similar, and it is convenient to be able to open to the rules governing each, in the same volume. I have endeavored, in this treatise, to bring out fully and plainly all the rules of the common law now in force upon these two subjects, and, at the same time, to present in comprehensive form the changes and modifications which have been made by statute. The policy of the several states in respect to married women and marital rights is particularly important and interesting, and this statutory policy is fully treated in this work. I have sought to examine all the statutes upon the subject, and, so far as practicable, all the reported decisions of importance touching the question, and then to embody the law in a clear and comprehensive statement, noting the

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statute and the authority upon which the statement is made. Thus it has been my design to make the work reliable, and to a certain extent an *authority*, upon the subjects treated. It is not the province of the text writer to *make* law, but rather to ascertain and state what it is. We have the *lex non scripta*—the unwritten or common law; and the *lex scripta*—the written or statute law; and the law as a whole is contained in the constitution and statutes of the state, in books of reports and judicial decisions, and in the treatises of learned sages of the legal profession, preserved and handed down to us from the highest antiquity. All these different sources it has been my effort to examine, and bring together all that relates to the subjects discussed. In some instances I have given the law in the language of the statutes or judges, but more generally, I have given the *substance* of the statute, and extracted the principles enunciated by the opinions pronounced, or settled by the judgment of the court. In all cases where statutes have received judicial construction, I have adopted the construction given by the court, although occasionally I have ventured an opinion as to the scope or object of a statute, but in a way that the reader will readily discover that it is not the language or determination of a judicial tribunal. I have sought to collect, from the reported decisions, all the principles settled, and the rules adopted, in respect to the subjects treated; and, while a great number of cases are cited, the repetition of a doctrine enunciated has been studiously avoided. Enough has been taken from the cases referred to, to bring out clearly the doctrine inculcated, in order that the text might be reliable and free from mistake. Throughout the whole I have labored "to combine accuracy and conciseness," and to this end I have endeavored to verify by personal examination all the cases referred to, though in some instances I have been obliged to depend upon the fidelity of digests for the correctness of my citations.

I have had liberty to use freely the American edition of Mr. Bingham's work on the "Law of Infancy and Coverture," the English editions of Mr. McPherson's treatise on infancy, and Mr. Bright's "Treatise on the Law of Husband and Wife, as Respects Property," and have appropriated all that I thought would be practically useful. Besides, I have received essential aid from Judge Reeve's work upon the "Domestic Relations," the last edition of which is still a very valuable book, Mr. Scribner's

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treatise on the law of dower, Mr. Bishop's "Commentaries on the Law of Marriage and Divorce," and Mr. Cord's "Treatise on the Legal and Equitable Rights of Married Women;" and especially am I under obligations to these authors for the reference to cases, many of which I have used. But a very important feature in this treatise is, the elaborate exposition of the statutory policy and local peculiarities of the several states, in respect to husband and wife and marital rights. Lawyers are often consulted in respect to the laws of neighboring states concerning dower, divorce, and the rights of married women; and it will be a convenience which the profession will appreciate, to have a volume at hand in which is embodied the substance of the legislation upon these subjects, together with the results of the litigation which a radical change in the law always engenders. It will be observed that the statutes of many of the states are somewhat similar, so that the decisions of the courts under them have a common application, and may be used as an authority beyond the particular forum in which they were pronounced. While I have made use of all the works within my reach treating upon kindred subjects, for the purpose of ascertaining the law, I have not followed the beaten track of any previous author. The plan which I have adopted is my own, and I trust that it will prove satisfactory and convenient. I flatter myself that the work will be found useful to the profession, and should it receive the approbation of the bar I shall be more than gratified.

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LAW OF INFANCY AND COVERTURE.

PART I.

LAW OF INFANCY.

CHAPTER I.

WHO ARE INFANTS—GENERAL DISABILITIES IMPOSED UPON INFANTS—
CANNOT APPLY TO BODIES POLITIC—ILLUSTRATIONS.

§ 1. MAN, upon his entrance into the world, is entirely incapable of protecting himself; and his natural powers and faculties, both physical and moral, require a number of years for their complete development. Probably there is no creature so helpless at birth as the human being. The law has, therefore, wisely imposed upon man, for a limited period, certain disabilities, and endued him with certain privileges, which are implied in the term *infant*.

By the common law, which generally prevails in this country, no person acquires fully all his political and civil rights until he has completed the age of twenty-one years, at which time his infancy terminates. This rule, however, does not prevail in all systems of jurisprudence.

By the civil law which obtains in Spain and some other countries, emancipation does not take place until the infant is *twenty-five*. The selection of twenty-one, rather than any other period, by the common law, as the age of majority, is supposed to have originated in the feudal system, which regarded the subject as first physically capable at that age, if a male, of doing knight's service, and following his lord to the wars; and if a female, not before of a suitable age to marry any one upon whom those duties would devolve. (*Bingham on Infancy*, 1, *Note 1*.)

No period could be selected for the termination of infancy which would be entirely equal, for the reason that some persons mature earlier than others. But the law must prescribe *some* age for the emancipation of the infant, and probably twenty-one years is as well as any other. And it may be suggested, as an interesting fact, that human life is divided into four periods, each of which is a multiple of seven. Natural infancy ends at seven years; puberty begins at fourteen years; legal infancy ends at twenty-one years; and the natural life of a man is three-score years and ten. (*Story on Contracts*, 2d ed. § 55.)

§ 2. In law, a person is reputed to be twenty-one years of age, on the opening of the last day of the twenty-first year of his life, although, by the natural computation of time, several hours might intervene before he *actually* attains to the full age of twenty-one years. For example, a man born on the first day of February, 1600, after eleven o'clock at night, was adjudged to be of full age the second minute after one o'clock on the morning of the last day of January, 1621. (*Anonymous*, 1 *Salk. R.* 44.) Here it will be observed that the individual had not lived twenty-one years by about forty-eight hours; and if the birth were on the last second of one day, and the act on the first second of the preceding day, twenty-one years after, then twenty-one years would be complete, because the law recognizes no fraction of a day, and it is the same whether a thing is done upon one moment of a day or on another. (1 *Black. Com.* 464, note 12, by Chitty. *Sir Robert Howard's case*, 2 *Salk. R.* 625. *Roe v. Hersey*, 3 *Wilson R.* 274. *Herbert v. Turball*, *Keble's R.* 589. *Nichols v. Ramsey*, 2 *Mod. R.* 281. *Fitzhugh v. Dennington*, 6 *ib.* 260. *Hamlin v. Stevenson*, 4 *Dana's [Ky.] R.* 97. *State v. Clark*, 3 *Harring. [Del.] R.* 557. *Anon.* 1 *Raym. R.* 480. 20 *Am. Jur.* 252.)

§ 3. By the English common law, the period at which the person attains to the full age of majority is the same for both sexes; but, in some of the American States, females are considered of age at eighteen. Thus, in Vermont, it is declared by statute that males of the age of twenty-one years, and females of the age of eighteen years, shall be considered of full age for all purposes, and that before those ages they shall be considered minors. (*R. S.* 1863, ch. 72, § 1. *Sparhawk v. Buell's Adm.* 9 *Vt. R.* 41. *Young v. Davis*, *Bray. R.* 124.)

So, also, in the State of Illinois, it has been held that females there attain majority at eighteen years of age. (*Stevenson v. West-*

fall, 18 *Ill. R.* 209. *Kester v. Stark*, 19 *ib.* 328.) The same is the law in Ohio. (1 *R. S. ch.* 56, § 1.)

In Maryland, female infants, on attaining the age of eighteen, have the right to dispose of their real estate by will, but with this, and perhaps another statutory exception, the common law is applied to females, as well as males. (*Maryland Code*, Art. 93, § 300. *Corrie's case*, 2 *Bland's Ch. R.* 488.)

In Nebraska it is declared by statute that males shall be regarded at full age at twenty-one, and females at eighteen (*R. S. ch.* 22, § 1); and in the State of Texas it is provided by statute that every female under twenty-one years of age who shall marry in accordance with the laws of the state, after such marriage, shall be deemed to be of full age. (*Oldham and White's Digest of Laws*, Art. 1400.) This provision of the statute has been held to apply to all marriages, but not to legalize acts before the passage of the act (*Chubb v. Johnston*, 11 *Texas R.* 469); and further it is held that the statute of limitations commences to run at the date of the marriage. (*White v. Latimer*, 12 *Tex. R.* 61.)

When the exception exists, it is probably upon the assumption that females possess as much discretion at eighteen as males at twenty-one; and it is a fact that females, as a general rule, mature about three years earlier than males. On the contrary, among the ancient Greeks and Romans, women were never of age, but were subject to perpetual guardianship, unless when married, "*nisi convenissent in manum viri*"—or, in plain English, except when they come into the husband's possession; and when that perpetual tutelage wore away in process of time, full age, in females as well as males, was not till twenty-five years. (1 *Black. Com.* 464, citing *Inst.* 1, 23, 1.)

§ 4. Upon the general principle that all laws which regard majority, minority and emancipation are personal, the law of the domicile of birth has been held to govern the state and condition of the minor into whatever country he may remove, and that his minority ceases at the period fixed by such law for his majority. (*Barrera v. Alpuente*, 18 *Martin's [Louis.] R.* 69.) And Judge Story lays down the doctrine, as well maintained by the most eminent foreign jurists, that a person who has attained the age of majority by the law of his native domicile is to be deemed everywhere the same, of age; and, on the other hand, that a person who is in his minority by the law of his native domicile is to be deemed

everywhere in the same state or condition. (*Story on Conflict of Laws*, 52, and *authorities cited*.) The same doctrine has been recognized by the old supreme court of the State of New York. (*Thompson v. Ketcham*, 8 *Johns. R.* 189.) This does not necessarily conflict with the rule that, upon a change of domicile, the capacity or incapacity of the person is regulated by the law of the new domicile; or, as Pothier lays it down, "the change of domicile delivers persons from the empire of the laws of the place of the domicile they have quitted, and subjects them to those of the new domicile they have acquired." (*Story on Conflict of Laws*, 69.) The *lex loci* generally governs in respect to the capacity and condition of the person, as to acts, rights and contracts done, acquired or made out of his native domicile; but as to acts done, or rights acquired, or contracts made, in the place of his native domicile, the state and condition of the person, according to the law of his domicile, will generally be regarded in other countries. For example, if a person be a minor by the law of his domicile until the age of twenty-five, yet, in another country, where twenty-one is the age of majority, he may, on attaining that age, make, in such other country, a valid contract. (2 *Kent's Com.* 234, *note c.*) But in the case supposed, had the contract been made in the place of his native domicile, even at the age of twenty-four years, the contract could not be enforced in the other country where the age of majority was at twenty-one. The general rule as to contracts is, that the *lex loci contractus* governs as to the nature, validity, construction and effect of the contract, and the *lex fori* as to the remedy. When the provisions of the law render the contract void or terminated in any way, the *lex loci* always applies. (*Vide Garet v. Frank*, 36 *Barb. [N. Y.] R.* 328.)

§ 5. The incidents, however, which the law has attached to infants in their natural capacity do not extend to them in the exercise of corporate or political functions, as imbecility and inexperience are not supposed to form a part of those abstract existences which are constituted for the mere performance of public service, and so far as that is concerned the natural properties of the infant merge in his political capacity, "to which age is neither material nor imputable." (*Bro. Age*.) Therefore, as has been well said, if the King, within age, consent to an act of parliament, or make any lease or grant, he is bound presently, and cannot after avoid them, either during his minority or when he comes of full age, for the

King, as a body politic, cannot be a minor. (*Bing. on Inf.* 3, and cases there cited.)

So it has been adjudicated that an infant may be a mayor, and on the same principle the acts by the mayor and commonalty cannot be avoided by reason of the nonage of the mayor. (*Cro. Car.* 556.) And if a parson, improperly admitted under age, make a lease with the due requisites, it will be binding on his successor; for the parson made the lease in his capacity of corporation sole. (*Bro. Age. Bing. on Inf.* 4.) On the same principle, the acts of no public officer can be repudiated or avoided by reason of the nonage of the incumbents, although there are certain offices, as we shall presently see, which a minor cannot properly hold.

§ 6. There are some general disabilities imposed on an infant, for the security of others. He is considered incapable of holding or exercising any office which relates to the administration of justice, though he may exercise those offices that require only skill and diligence; thus in England an infant cannot sit in the house of lords,* or be elected a member of the house of commons, or be a judge, juror or bail. (*Hob.* 325. *Cro. Eliz.* 637. *Jenk.* 319.) Neither can an infant in England be a common informer, nor a sheriff's officer. (*Maggs v. Ellis*, *Buller's N. P.* 196. 3 *Steph. N. P.* 2059. *Cuckson v. Winter*, 17 *Eng. C. L. R.* 306.) Nor can he be legally appointed clerk of a court of requests, when it is a part of the duties of that officer to receive the money of suitors. (*Claridge v. Evelyn* 7 *Eng. C. L. R.* 32.) Neither can an infant exercise the office of burgess of a borough or town. (*Rex v. White*, 2 *Selv. N. P.* 1068, *n.*) And in Connecticut an infant cannot serve a writ as an indifferent person (*Tyler v. Tyler*, 2 *Root's R.* 519),

* In ancient times, minors appear frequently to have taken upon themselves to sit in Parliament. It appears by a speech of Waller, reported by Gray in his *Debates*, that the poet sat in Parliament when he was but sixteen years of age; and in Newton's *Fragmenta Regalia*, there is a passage stating that "about the 10th of James I, there were accounts taken of forty members not above twenty years of age, and some not exceeding sixteen." It is also stated in Gray's *Debates*, that Lord Torrington, son of the Duke of Albemarle, was but fourteen years of age at the time when he took part in a debate, as member of the House of Commons. (*Macpherson on Infants*, 449, note *t.*) And it appears from the life of Fox, the great statesman and orator, that he was elected from Midhurst when he was but nineteen, took his seat in Parliament, and made his first speech when he was but twenty years old. (*Vide New American Cyclopædia*, tit. *Charles James Fox*.) It is now, however, expressly enacted that no person shall be capable of being elected as a member of Parliament who is not of the full age of twenty-one years (7 and 8 *Will.* 3, ch. 25, § 8); and it has been decided that the election and return of an infant is vexatious, and the votes given for an infant candidate, after notice of his being ineligible, are thrown away. (*Macph. on Inf.* 450.)

though in New Hampshire it has been held that he may be legally deputed by the sheriff to serve and return a particular writ of attachment. (*Morse v. Graves*, 3 *N. H. R.* 408.)

In the State of New York it is provided by statute that no person shall be capable of holding a civil office, who, at the time of his election or appointment, shall not have attained the age of twenty-one years. (1 *R. S. part 1, ch. 5, tit. 6, § 1. 1 Stat. at Large*, 106. *People v. Dean*, 3 *Wend. R.* 438. *Green v. Burke*, 23 *ib.* 490. In the State of Rhode Island, infants are expressly prohibited from holding a public office by the constitution of the commonwealth. (*State Const. art. 9, § 1, and art. 2, § 1.*) And this is the law in Tennessee (*Code of 1858, § 748*), and in nearly or quite all of the American States, and of the Federal Government, although in some few instances minors have held high and responsible offices by federal appointment.

For example, Stevens T. Mason was appointed by President Jackson secretary of the territory of Michigan in 1831, when he was but nineteen years of age, and upon the translation of General Cass, the governor, to the war department at Washington, he became the acting governor, and during his gubernatorial term he distinguished himself, though but a mere youth, by the calmness, ability and courage with which he maintained the rights of the territory. Other similar instances have occurred in various parts of the Union; and it is proper to remark that in all cases the acts of a public officer are binding upon the public until the appointment, if improvidently made, shall be declared void. In England, an infant may be a clerk of the peace. (*Crosby v. Hurley*, 1 *Alcock & Napier's [Irish] R.* 431.) He cannot be an innkeeper, so as to be charged on the custom of the realm for negligence. (*Bac. Abr. Infancy, E. Carthen*, 161.)

In the United States there is no objection to the election of minors to be commissioned officers of any rank in the militia and in the army and navy. Under the laws of Massachusetts, it has been held that the infancy of a person over eighteen years of age does not disqualify him for the office of clerk of a company in the militia. (*Dewey, Petitioner*, 11 *Pick. R.* 265.)

If an infant commit any wrongful act in an office which he is capable of holding, he will, of course, be liable therefor.

An infant cannot be made a bankrupt; and a commission of bankruptcy against an infant would be absolutely void. (*O'Brien*

v. *Currie*, 14 *Eng. C. L. R.* 307. *Belton v. Hodges*, 23 *ib.* 309.) An infant cannot, of his own choice, change his domicile. He is not *sui juris*—of his own right. (*Ex parte Bartlett*, 4 *Brad. R.* 221.)

An infant cannot be naturalized on his own petition. (*Le Forrester's case*, 2 *Mass. R.* 419.) Nor can he acquire a settlement by commorancy; so held in the State of Connecticut. (*Sterling v. Plainfield*, 4 *Conn. R.* 114. *Huntington v. Oxford*, 4 *Day's R.* 189.) But he may gain a residence by living and service with his father. (*King v. Chillesford*, 10 *Eng. C. L. R.* 279.) An infant may be a witness if proved to have sufficient discretion and understanding of the obligation of an oath. The test universally is, that the child feel the binding obligation of the oath from the general course of his religious education, it being held that the effect of an oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, recently communicated for the purpose of the trial. (*Rex v. Williams*, 32 *Eng. C. L. R.* 524.) And in one case in New York, where a child nine years old, though very intelligent, did not understand the nature of an oath, nor the moral penalty of false swearing, the court instructed her on the spot, and then allowed her to be sworn. (*Jenner's case*, 2 *City Hall R.* 147, 8, 9.) Children of ten, nine, seven, and even five years of age have been held competent. (*Regina v. Perkins*, 38 *Eng. C. L. R.* 236. *Commonwealth v. Hutchins*, 10 *Mass. R.* 225. *State v. Whittier*, 21 *Maine R.* 341. *Rex v. Brasier*, 1 *Leach Cr. Cas.* 237. *State v. Le Blanc*, 1 *Const. [S. C.] R.* 354.)

It is adjudicated that, before a child should be admitted to testify, the judge must be satisfied that the child feels the binding obligation of an oath from a general course of religious education. (*Rex v. Williams*, *supra*.) The adverse party may require that a witness of tender years shall be examined as to his understanding of the nature and obligation of an oath. (*People v. McNair*, 21 *Wend. R.* 608.)

§ 7. It has also been held in England that an infant is not capable of the stewardship of a manor, or of the stewardship of the courts of a bishop; nor can he take a grant of those offices in possession or reversion. This disability is put upon the ground, not only that by intendment of law the infant has not sufficient knowledge, experience and judgment to use the office, but also that by law he

cannot appoint a deputy. (*Bing. on Inf.* 4.) By the common law an infant cannot make a will of lands, and this is the rule in all, or nearly all, of the American States. He may, however, make a testament of chattels, if a male, at the age of fourteen, and if a female, at the age of twelve years, except in some of the States the rule is varied by statute. The civil law gave this power to the infant at the age of seventeen years, and this is the period which is fixed by the statute of Connecticut.

In the State of New York the period adopted, is the age of eighteen in males and sixteen in females. (2 *R. S. part 2, ch. 6, tit. 1, § 21.* 2 *Stat. at Large* 61, as amended by *ch. 782, Laws of 1867, § 4.*)

None under full age can devise their property, real or personal, in Vermont, Massachusetts, New Hampshire, Ohio, Pennsylvania, Maine, Indiana, New Jersey, North Carolina, Mississippi, Texas and Florida.

In Rhode Island, Maryland, Missouri, Oregon and Virginia, the required age is eighteen for a testament of personal property. (*Vide the Statutes of the several States.*)

In the new State of Nebraska none but adults can make a valid will of either personal or real estate, except that a married woman under age may execute a will with the consent of her husband. (*R. S. ch. 14, §§ 123, 126.*)

In the State of Illinois none but adults can make a valid will of real estate, except females at and above the age of eighteen, and unmarried; and all persons at and above seventeen years of age may make a will of personal estate. (*Gen. Stat., 1858, page 1180.*)

In the State of South Carolina an infant at the age of eighteen may make a valid will of personal estate by conforming to the Statute of 1824 upon the subject. (*Posey v. Posey, 3 Strobb. R. 167.*)

An infant cannot be a public attorney for prosecuting suits at law and equity, though he may be a private attorney, for the purpose of performing acts so merely ministerial as to require little or no judgment, experience or skill. (*Vide Bing. on Inf. 4, note m.*)

Neither can an infant be a bailiff, factor or receiver, because he is not to be charged in any account, though it would seem that an infant might be appointed a factor, on his friends giving security for his accounting. (*Bing. on Inf. 5, and case cited.*) He cannot

be an administrator, because a bond is required to insure faithful administration, and the deed of an infant is not binding on him.

In case of a bailiff, the disability is that of stating an account, and in case of an administrator, the privilege is that of avoiding his bond. When the infant is entitled to administration in New York, as being next of kin to the intestate, letters must usually be granted to the guardian of the minor, who is in other respects competent. (2 *R. S. part 2, ch. 6, tit. 2, § 33. 2 Stat. at Large, 77.*) But should administration be granted to the minor, where there was no positive statute to forbid it, the administration could not determine until the infant attained to the age of majority. (*Bing. on Inf. 5.*)

An infant at common law may act as an executor at the age of seventeen, and his acts as such will bind him, unless they be acts which would amount to *devastavit*—to waste; and this is the rule in all of the states, except when changed by positive enactment. In New York, an infant is declared incompetent to act either as executor or administrator. (2 *R. S. part 2, ch. 6, tit. 2, § 3. 2 Stat. at Large, 71.*)

It may be stated, in general terms, that when the act of the infant is void, the incident of infancy is regarded as a disability but when the act is simply voidable, the incident is a privilege.

CHAPTER II.

WHAT ACTS OF AN INFANT ARE ABSOLUTELY VOID—THE CRITERION OR TEST—CASES ILLUSTRATING THE PRINCIPLE.

§ 8. THE method taken in law to protect an infant against the effects of his own weakness has been to consider his acts as not binding, and allow him to rescind all contracts entered into by him, with certain exceptions, which will be hereinafter specifically noticed. There are, however, two degrees in which his acts or instruments appear to be not binding. First, by being considered as if they had never existed, viz.: wholly void; and, secondly, as being defeasible, at the election of the party with whom they originated, that is *voidable* only. (*Bing. on Inf. 8.*)

A *void* act never is, and never can be binding, either on the party with whom it originated, or on others. No person claiming through or under it can succeed, and the void act can never at any time or by any means be confirmed or rendered valid. (*Bing. on Inf.* 9.) Any person interested may take advantage of a void act of an infant, which is not the case when the act is simply voidable. It is a matter of great importance, therefore, to ascertain, if possible, what acts of an infant are void, and what are merely voidable; and here Chancellor Kent has well said that, "when we attempt to ascertain from the books the precise line of distinction between void and voidable acts, and between the cases which require some act to affirm a contract in order to make it good, and some act to disaffirm it, in order to get rid of its operation, we meet with much contradiction and confusion. (2 *Kent's Com.* 234.)

Two rules are stated by Mr. Bingham (*Bing. on Inf.* 9) to assist us in coming to a conclusion upon the subject, but he adds that "neither of them, on examination, will be found satisfactory." The first given is from Perkins, an ancient writer (*Perkins*, § 12), "that all gifts, grants or deeds made by infants, which do not take effect by delivery of his hand, are void." To this Mr. Bingham suggests, "that if the rule held good in all cases, a *parol* lease for years made by an infant would be absolutely void," while it cannot be denied that "the infant could recover in an action for rent arrears on such lease," and hence the inference that the lease would be "clearly only voidable." This rule of Perkins, however, was approved by Lord Mansfield in a special case of ejectment, when the question was "whether an infant's conveyance by lease and release was absolutely void, or only voidable," Lord M. asserting,—"we think the law is as laid down by Perkins." (*Zouch v. Parsons*, 3 *Burr. R.* 1804.)

On the contrary, Chancellor Jones in a case decided in the late court of errors of the State of New York, says: "Some of the old writers seem to make a distinction between deeds and other contracts of infants accompanied by manual delivery; but the distinction is now discarded, and the same effect is given to both." (*Stafford v. Roof*, 9 *Cow. R.* 626.) At all events, as Mr. Bingham remarks, "the rule comprehending only gifts, grants and deeds is not sufficiently extensive for general application." (*Bing. on Inf.* 10.)

§ 9. The second rule referred to by Mr. Bingham is, "that those acts are void in which there is no semblance of benefit to the

infants." (*Bing. on Inf.* 11.) This rule does not seem to have received the full sanction of Mr. Bingham; and Mr. Justice Wilde, of the supreme judicial court of Massachusetts, over fifty years ago, averred that it would be more correct to say, "that those acts of an infant are void which not only apparently, but *necessarily*, operate to his prejudice," and further, that "the benefit of the infant is the great point to be regarded; the object of the law being to protect his imbecility and indiscretion from injury, through his own imprudence, or by the craft of others." (*Oliver v. Houdlet*, 13 *Mass. R.* 237.)

The rule was laid down by Eyre, Ch. J., of the court of common pleas of England, that those contracts of infants only were void which "the court *can pronounce to be to their prejudice*." (*Keene v. Boycott*, 2 *H. Bl. R.* 515.) This is undoubtedly the doctrine of the current of the English authorities, with the understanding, perhaps, that it must be apparent upon the face of the instrument or transaction that it is to the prejudice of the infant; and this is probably the most intelligible rule upon the subject which can be extracted from the decisions in this country; although the rule is often exceedingly difficult of application, liable to many exceptions, and by no means satisfactory. Chief J. Bronson, of the New York supreme court, after stating the doctrine laid down by Lord Ch. J. Eyre in the case of *Keene v. Boycott*, *supra*, says: "This may answer well enough as a general rule, but it must be subject to exceptions." (*Fonda v. Van Horne*, 15 *Wend. R.* 635.) The subject has undergone no inconsiderable discussion in the American courts, including the supreme court of the United States, and the result is about as above stated. (*Vide Tucker v. Moreland*, 10 *Peter's R.* 70. *Also Vent v. Osgood*, 19 *Pick. R.* 572. *Lawson v. Lovejoy*, 8 *Greenl. R.* 405. *Fridge v. The State*, 3 *Gill & John. [Md.] R.* 104. *Wheaton v. East*, 5 *Yerger's [Tenn.] R.* 41. *Kline v. Beebe*, 6 *Conn. R.* 494.) The reason of the rule in favor of the infants, as stated by Story in his treatise on contracts, is, that "in such case the presumption is almost irresistible that some unfair advantage has been taken of him; or some injurious influence has been exerted;" and he adds, "the only difference in this respect between the contracts of adults and infants is, that in the one case injury is only evidence of imposition, while in the other it is allowed as an uncontrollable presumption thereof, because of the inexperience of the infant." (*Story on Con.* 2d ed. § 57.)

§ 10. The tendency of modern decisions, and the opinion of elementary writers, is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and susceptible of ratification or disaffirmance, at their election, when they become of age. (2 *Kent's Com.* 235.)

Mr. Bingham confidently asserts that in his day it could be successfully contended, that few of the acts of an infant were absolutely void, and he maintained his position upon these grounds: First, on the principle of the law relating to infants, which is to protect the infant against the effects of his own weakness; and if this protection can be effectually secured to him by any means short of inflicting a detriment on innocent persons, it is argued that such infliction must be unnecessary and unjust. To consider any acts of an infant absolutely void, might operate to his own protection, but it would in many cases seriously affect the rights of persons in nowise implicated in the infant's transactions, and might not unfrequently be prejudicial to himself. It is thought, therefore, that it would rarely be a greater indulgence to the infant, and more for his advantage, to allow him, when he comes of age and is capable of reconsidering what he has done, either to ratify and affirm all his deeds and contracts, or to break through and avoid them; and he contends that this power should be extended, as well to those acts which may turn out to the infant's disadvantage, as to those which are apparently beneficial. The giving infants such power in general over all their acts, he insists, will sufficiently secure them against the danger of being overreached by others; for when the power is general, and all persons who deal with an infant know they are to be at his mercy, this will take off from the temptation of imposing on him; yet, since the infant is at liberty to rescue himself by avoiding the injurious contract, it seems no possible mischief could arise by suffering it in the meantime to hang *in equilibrio*, and deferring to pronounce any sentence upon it, since that would curtail the infant's privilege, and take off from his freedom of judging at all. This is substantially Mr. Bingham's reasoning upon the first ground taken to sustain his position, and though it is not entirely free from criticism, it would seem to be quite satisfactory. (*Bing. on Inf.* 13-16.)

§. 11. The second ground assumed by Mr. Bingham to maintain the position, that few if any of the infant's acts are void, is that it

accords with the principles of pleading. This is more a principle of practice, and of course has not the merit of the first ground. Any thing which at common law renders a deed absolutely *void*, as rasure, interlineation, coverture, or lunacy at the time of execution, may be given in evidence under the general issue of "*non est factum*." The instrument under such circumstances is considered as if it had never existed, and, in that view, "is not the deed of the defendant." But infancy must be pleaded specially, and cannot be given in evidence under the issue of "*non est factum*." * The infant's deed, which will bind others, at least, cannot be considered already void, or no deed at all, but must be *avoided* only by showing the circumstances under which it was created. This reasoning is more matter of form than of substance, and yet it has its bearing upon the question involved. (*Bing. on Inf.* 16-17.)

§ 12. The third ground of Mr. Bingham to sustain his position, is predicated upon a review of the cases decided. In regard to these, it is frankly confessed that very little can be gathered from their expressions toward the solution of the question, except in those cases where the rights of third persons coming into consideration, the very point of discussion was, not the mere discharge of the infant, but whether his deed was void or voidable; and it is averred that in the greater part of them, the protection of the infant being the only point in question, both the court and the bar, so long as that object was attained, seem to have used at random the terms *void* and *voidable*, without any regard to precision. The author only refers to one authority (*Cro. Eliz.* 920), where the question is stated to have been whether the deed was *good* or voidable, and the court held it *void*, which word the reporter evidently uses in the same sense as the word *voidable* preceding. (*Bing. on Inf.* 18.)

The conflicting language of some of the cases upon this point may be reconciled, by the confounding of the words "void" and "voidable," as they have been vaguely used in many of the decisions. The language of the court in one case was: "the bond is

* Lord Coke says, "One of the best arguments or proofs in law, is drawn from the rights, entries or course of pleading." (*Co. Litt.* 115, b.) This would help to sustain Mr. Bingham in his position, provided the rule was as he stated, that "infancy must be pleaded specially," but all treatises of pleading, both English and American, admit that infancy may be proved under the general issue of non-assumpsit, which would be contrary to all analogy, if the contract were merely voidable at the election of the party. (*Derby v. Boucher*, 1 *Salk. R.* 279.) The practice in this country at present, however, requires infancy to be pleaded, at least in most of the states.

voidable only, at the election of the infant" (*Conroe v. Birdsall*, 1 *Johns. Cas.* 127), and yet the marginal note indicates that the court held the bond "void at law," and Senator Tracy, in the court of errors of the State of New York, referring to the case, says: "It was held that a bond executed by an infant is void, though he fraudulently alleged, at the time of making it, that he was of full age." (*Mason v. Duncan*, 15 *Wend. R.* 71.) Chancellor Kent seems to have fallen into the same error in extracting the law of this case. (2 *Kent's Com.* 241.) So in the supreme court of Pennsylvania, Justice Duncan, speaking of the infant's contract as a surety, calls it "absolutely void," but in the next line speaks of "confirming," and "distinct acts of confirmation," indicating very clearly that, in his opinion, the contract was susceptible of a ratification, and, of course, was only voidable, and not "absolutely void." (*Curtin v. Patten*, 11 *Serg. & Rawle R.* 311.)

In a similar manner, in one of the English common law courts, Bayley, J., calls the contract of an infant under consideration a void one, but the case shows that if there had been a ratification *before* the action was commenced, as there was *after*, the infant would have been bound, which could not have been the case had the contract been void. (*Thornton v. Illingworth*, 9 *Eng. C. L. R.* 256.)

In another case, Sir James Mansfield uses the word void in the same indefinite manner, calling the contract void in one part of his opinion, and in another saying: "the contract is not void *until he avoids it*." (*Gibbs v. Merrill*, 3 *Taun. R.* 307.) And in another case, the court recognizes this indefinite use of the word, for they say in effect, that an infant's contracts are void, if by void is meant *incapable of being enforced against them*; but if by void is meant *incapable of being satisfied*, then they are not void. (*Williams v. Moore*, 11 *Mees. & Wels. R.* 256.) These instances are sufficient to illustrate the vague use of the word void, and may seem to reconcile some apparently conflicting cases upon the subject.

§ 13. The acts of an infant which have been declared by judicial authority to be absolutely void are very few, and many of the decisions on the subject have been overruled or modified by subsequent adjudications.

It has been decided that a warrant of attorney, given by an infant, is absolutely void, and not voidable merely, and the court declared that they could not make it good, though there appeared circumstances of fraud on the part of the infant. (*Saunderson v.*

Marr, 1 *H. Bl. R.* 75.) The same doctrine is held in the State of Pennsylvania. (*Knox v. Flack*, 22 *Penn. R.* 33.) And Bronson, Ch. J., of the New York supreme court, said, without any qualification whatever: "An infant cannot make an attorney. The appointment would be void." (*Fonda v. Van Horne*, 15 *Wend. R.* 636. And *vide Maples v. Hastings*, 3 *Harrington's R.* 403.) And it was held in the same court, that a warrant of attorney by an infant to confess a judgment was void, and a judgment entered in virtue of such warrant of attorney was set aside, on motion. (*Bennett v. Davies*, 6 *Cow. R.* 393.) So it has been expressly adjudicated that a power of attorney by an infant to sell land is absolutely void. (*Lawrence v. McArter*, 10 *Ohio R.* 37, 42. *Pyle v. Cravens*, 4 *Littell's R.* 17, 21.)

In England it has been held, that a joint warrant of attorney given by several persons, one of whom was an infant, will be valid as to the infant. (*Ashton v. Langton*, 30 *Eng. C. L. R.* 567.) It has also been held, in the State of Tennessee, that the release of a legacy by an infant was void. (*Langford v. Frey*, 8 *Humph. R.* 443.) So also a bond executed by an infant as surety, inasmuch as it cannot be for his benefit, is declared to be void; and a release made by him to his guardian has also been held to be void. (*Story on Contracts*, § 57, and cases there cited.) Simple bonds however are now considered as governed by the same rule as simple contracts, and if not manifestly of a prejudicial character they are not void. (*Slocum v. Hooker*, 13 *Barb. R.* 538.)

It was formerly held, that a negotiable promissory note by an infant was absolutely void. (*Swasey v. Vanderheyden's Administrator*, 10 *Johns. R.* 33.) But now it is well settled to be voidable only, and that it may be ratified by the infant when he comes of age. (*Goodsell v. Myers*, 3 *Wend. R.* 479. *Everson v. Carpenter*, 17 *ib.* 419.)

A will of lands, made by an infant under the age prescribed by statute, would be absolutely void. (*Herbert v. Torball*, 1 *Sid. R.* 162.) A republication of the will after the infant attained the proper age would be the first creation of it; for had the infant died within age, or after age, without republishing the will, no devisee could have taken under it any more than if it never had existed.

A mortgage executed by an infant *feme covert* to secure a debt of her husband, would be absolutely void. (*Chandler v. McKenley*, 6 *Mich. R.* 217.)

It is clear that an infant cannot be bound by an account stated, and perhaps it might, with some plausibility, be contended that such account was absolutely void, on the ground that the transaction does not admit of reference or reconsideration without becoming substantially a new act, and is therefore incapable of ratification, the chief ingredient of a voidable act. However, the better opinion now is, that an account stated by an infant is only voidable, and, if ratified, an action of debt, as well as assumpsit, will lie. (*Vide Williams v. Moor*, 11 *Mees. & Wels. R.* 526.)

A release of debts by an infant executor is void, for the reason that administration is only committed to the infant *sub modo*, and his power does not extend to the release of debts, though he may give a valid acquittance when they are paid. (*Russell's Case*, 5 *Coke's R.* 28.) A release by a female infant, to her guardian, has been held void in Maryland, on the ground that it was against sound policy. (*Fridge v. The State*, 4 *Gill & John. R.* 104.) And if an infant enfeoffs his guardian it will be void, for the apparent prejudice it must be to the infant. (*Bac. Abr. Inf.* I. 137.) Other authorities might be cited, but they would give no additional light upon the subject.

The only clear and definite proposition which can be extracted from the authorities is, that all acts of an infant which are incapable of being legally ratified, that is, all such acts as cannot be for the benefit of the infant, are absolutely void, and these at the present day are reduced to a very small number. The real importance attached to this question is, that parties other than the infant may determine whether they are bound by the act or contract of the infant.

CHAPTER III.

WHAT ACTS OF AN INFANT ARE VOIDABLE ONLY—THE CRITERION OR TEST—CASES ILLUSTRATING THE PRINCIPLE—TENDENCY OF MODERN DECISIONS.

§ 14. MUCH the greater portion of all the acts and contracts of an infant are voidable only, for it is the policy of the law not to incumber the free action of the infant by disabilities, but allow him the right to suspend his ultimate decision upon a doubtful question

of benefit, until he shall be of full age and placed on a footing equal to the other contracting party.* (*Story on Con.* § 58.)

A voidable act is binding on others until disaffirmed by the infant, and is capable of being confirmed or rendered valid when the infant attains to the age of majority. The rule laid down by Perkins is, that "all gifts, grants or deeds, made by infants, by matter in deed or writing, which do take effect by delivery of his hand, are *voidable* by himself, by his heirs, and by those who have his estate." (*Perkins*, § 12.) But the rule stated by Parker, Ch. J., which is more satisfactory and more generally recognized by the courts of this country as the true test, is, "that whenever the act done *may be* for the benefit of the infant, it shall not be considered void, but that he shall have his election, when he comes of age, to affirm or avoid it." (*Whitney v. Dutch*, 14 *Mass. R.* 462.) Perhaps it may be assumed as a principle, also, that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable. They remain a legal *substratum* for a future assent, until avoided by the infant or other proper party; and if, instead of avoiding, he confirm them, when he has a legal capacity to make a contract, they are, in all respects, like contracts made by adults. (*Ib.*) It is regarded equally to the security of the infant, and more to his advantage, that by considering his acts voidable, we should give him the privilege of avoiding, which also implies that of confirming them, than that by considering them void, we should lay him under the *disability* of acting at all, and place him on a level with idiots and lunatics. It certainly could not be considered a great privilege to the infant for the court to have power to declare his contracts absolutely void, although he himself might choose to ratify them.

§ 15. The tendency of the later authorities is to hold that *semblance of benefit* to the infant in his acts or enjoyment is the criterion by which to determine that the act is voidable and not void. Bingham asserts that the only safe criterion by which we can ascertain whether the act of an infant be void or voidable is, "that acts which are capable of being legally ratified are voidable, only." (*Bing. on Inf.* 45.)

* Under the Spanish law at one time if not now in force in the State of Texas, the marriage of a minor is an emancipation and discharge from paternal power, and enables the infant to make contracts and do other acts, in the same manner as adults, which cannot be avoided on the plea of infancy. (*Burr v. Wilson*, 18 *Texas R.* 367.)

By legal ratification is meant, that the act supposed to constitute such ratification should be held a valid act only by reference to the preceding act intended to be ratified. This criterion Ch. Kent thinks does not free the question from embarrassment, or afford a clear and definite test; and he prefers the rule that, "whenever the act done *may be* for the benefit of the infant, it shall not be considered void, but he shall have his election, when he comes of age, to affirm or avoid it." (2 *Kent's Com.* 234.) Mr. Bingham admits that his own criterion appears at first sight a little like a *petitio principii*, or begging of the question, and that it might be so if the doctrine of *considerations* were not well and clearly established, or at least much better defined, than that of an infant's privileges. The criterion is drawn from the doctrine of considerations, and Mr. Bingham proceeds to show that the ratification of the infant's act after he becomes of age, is recognized by the law, only by a relation to the preceding act. Had that act never existed, or had it been void in law, which is the same as if it had never existed, the promise after age would have been a substantive and independent promise, unsupported by any consideration, and so incapable, as "*nudum pactum*" of incurring the subject of an action. The acts of the infant, though not absolutely binding on him, was, at a proper time, legally capable of ratification, and consequently only voidable. To illustrate: if the infant had given a bond to induce a female to live in prostitution with him, and after age had promised to pay the sum mentioned in the bond, that sum could not have been recovered by action. The first act being void, the second could not be referred to it legally. In law, the second being an independent, substantial act, was in this instance without consideration, and so not binding. The first act, therefore, was incapable of legal confirmation, and, consequently, absolutely void. (*Bing. on Inf.* 45-47.) This reasoning seems to be logical, and it is submitted that the rule of Mr. Bingham furnishes a fair criterion by which voidable acts may be distinguished from void, although the rule does not always constitute the *ground* of their being voidable. Each of the rules suggested may be advantageously applied in determining the important question as to the acts of an infant which may be ratified on his coming of age.

§ 16. There are innumerable adjudications upon the subject of contracts of infants which are voidable, and it would seem that an authority might be produced for almost every conceivable case that can arise.

It has been held in the State of New York, that a deed of bargain and sale, made by an infant, is like a feoffment with livery of seisin, *voidable* only, and Justice Bronson, who delivered the opinion of the court, stated that the rule seemed to be universal, "that all deeds or instruments under seal, executed by an infant, are voidable only, with the single exception of those which delegate a naked authority." (*Bool v. Mix*, 17 *Wend. R.* 119-131.)

The same learned judge lays down the same doctrine, and uses similar language, in a later case in the same court. (*Gillett v. Stanley*, 1 *Hill R.* 121.) In a still later case in the same court, it was held that the conveyance of land by an infant was voidable only, and that the grantee having title and possession under it, the covenant of seisin therein could only be broken by the infant's disaffirmance of it. (*Van Nostrand v. Wright*, *Lalor's R.* 260.)

In Arkansas it has been held that an infant may ratify every contract of his, after coming of age. (*Vaughn v. Parr*, 20 *Ark. R.* 600.) And in the late court of chancery of the State of New York, it was held that the deed of an infant, purporting to be founded upon a valuable consideration, was not absolutely void, but only voidable; and that to render a subsequent conveyance by the infant after he became of age an act of dissent to the prior deed, it must be so inconsistent therewith, that both deeds could not properly stand together. (*The Eagle Fire Company v. Lent*, 6 *Paige's R.* 635. *Vide also* *Wheaton v. East*, 5 *Yerger's [Tenn.] R.* 41. *Dearborn v. Eastman*, 4 *N. H. R.* 441. *Kline v. Beebe*, 6 *Conn. R.* 490.) A power of attorney, authorizing another to receive seisin of land for an infant, or to complete his title to an estate, conveyed to him by feoffment, is only voidable, because it is for the interest of the infant, and comes within the rule. (*Story on Con.* § 59 and *cases cited.*)

It has been decided in Massachusetts, that a *parol* authority to transact business for an infant is not void, but merely voidable. (*Whitney v. Dutch*, 14 *Mass. R.* 463. *Vide also* 20 *Am. Jur.* 256.) It has also been held in the same state that the assignment by an infant of a promissory note not negotiable was voidable only. (*Willis v. Twambly*, 13 *Mass. R.* 204), and again that a release of damages for an injury was valid unless disaffirmed by the infant. (*Baker v. Lovett*, 6 *Mass. R.* 78.) And once again, that a contract of charter by an infant for the hire of a vessel was only voidable. (12 *Pick. R.* 425.)

It has been held in the State of North Carolina that the compromise of a claim by an infant may be avoided. (*Tifton v. Tifton*, 3 *Jones' Law R.* 552.) An infant wife joining with her husband in a mortgage of her real estate, may plead infancy in an action to foreclose the mortgage, and thus avoid it. (*Schneider v. Staihe*, 20 *Miss. R.* 269.) A judgment, however, against an infant in an action where he defends by a guardian *ad litem*, is conclusive, and cannot be avoided. (*Kegans v. Allcum*, 9 *Tex. R.* 25.) So a judgment against an infant in a suit to which his natural guardian is a party, and appears, is binding. (*Wrisley v. Kenyon*, 2 *Will. [Vt.] R.* 25.) A judgment, however, will be set aside, against an infant, if he appeared by attorney, and not by guardian. (*Lee v. Jenkins*, 30 *Mo. R.* 592.) But when a nonsuit is given in an action against an infant, it is no ground of error that the infant appeared by attorney and not by guardian. (*Bird v. Pegg*, 7 *Eng. C. L. R.* 153.) And infant parties are liable for costs. (*Beames v. Farley*, 57 *Eng. C. L. R.* 177.)

It has been held in the State of New York that the promissory note of an infant is merely voidable and not void, and that a promise to pay, made by him after he attains his full age, renders the note valid. (*Everson v. Carpenter*, 17 *Wend. R.* 419. *Vide also Goodsell v. Myers*, 3 *Ib.* 479.) This same doctrine has been expressly asserted, or necessarily implied in many other cases, decided in the highest courts of this country and in England, and may well be regarded now as the law of the land. (*Wamsley v. Lindenlieger*, 2 *Rand. [Va.] R.* 478. *Lawson v. Lovejoy*, 8 *Greenleaf's [Me.] R.* 405. *Hesser v. Steiner*, 5 *Watts & Serg. R.* 476. *Jeffords, Adm. v. Ringgold*, 6 *Ala. R.* 544. *Reed v. Batchelder*, 1 *Metc. [Mass.] R.* 559. *Wright v. Steele*, 2 *N. H. R.* 51. *Fisher v. Jewett*, *Benton's [New Brunswick] R.* 35. *Dubois v. Whedden*, 4 *McCord's [S. C.] R.* 21. *Cheshire v. Barrett*, *Ib.* 241. *Bobo v. Hansell*, 2 *Bailey's R.* 114. *Orvis v. Kimball*, 3 *N. H. R.* 314. *Thompson v. Lay*, 4 *Pick. R.* 48. *Taft v. Sergeant*, 18 *Barb. R.* 320.) The cases holding a contrary doctrine may be considered as fully overruled.

The note of an infant has been held voidable, although he lived apart from his father. (*Tandy v. Masterson*, 1 *Bibb's [Ky.] R.* 330.) So, also, in a case where it appeared that the infant was carrying on a trade for himself, and the payee supposed him to be an adult. (*Van Winkle v. Ketcham*, 3 *Caines' R.* 323.) And in another case

where it was shown that the infant obtained the credit by falsely and fraudulently representing himself to be of full age, and gave his promissory note for the amount, the court held the note voidable, and that the maker might avail himself of his infancy to defeat it. (*Conroe v. Birdsall*, 1 *John. Cas.* 127.) The same rule would, of course, apply in the case of a bill of exchange made or accepted by an infant, as in that of promissory notes. (*Vide Hunt v. Massey*, 27 *Eng. C. L. R.* 230.)

An indorsement of a promissory note by an infant, so as to transfer the property to an indorser for a valuable consideration, is valid; and the infant can only avoid his indorsement, in case the maker is in default, by a plea of infancy. (*Nightingale v. Whittington*, 15 *Mass. R.* 274. *Frazier v. Massey*, 14 *Ind. R.* 382.)

An infant holder of a note may authorize another, by parol, to transfer such note by indorsement, and the act of indorsement will be voidable, and not void. (*Hardy v. Waters*, 38 *Maine* [3 *Heath*] *R.* 450.)

An action against an infant for his deceit and false warranty, may be defeated by a plea of infancy. (*Merritt v. Aden*, 19 *Vt. R.* 505. *Prescott v. Norris*, 32 *N. H. R.* 101.) That the infant fraudulently represented himself to be of full age, does not make him liable for the goods bought, but the demand may be defeated by the plea of infancy. (*Bartlett v. Wells*, 101 *Eng. C. L. R.* 836. *De Roo v. Foster*, 104 *ib.* 272. *Merriam v. Cunningham*, 11 *Cush. [Mass.] R.* 40.)

In all cases where a judgment is regularly entered against an infant, the same cannot be avoided by the plea of infancy in an action brought upon the judgment. (*Ludwicke v. Fair*, 7 *Ired. [N. C.] R.* 422.)

In the State of Iowa they have a statute providing that an infant cannot avoid his contracts and acts on the ground of infancy, when he has induced the adverse party to believe that he is of full age (*Code*, §1489); and in such a case, a judgment may be entered against the infant during his minority. (*Oswald v. Broderick*, 1 *Clarke's R.* 380.) It has been repeatedly held that an indorser of a bill of exchange, made by an infant, may recover against the acceptor or indorser; but perhaps it may be alleged that every new party to a bill of exchange or promissory note, originates, as it were, a new instrument to himself. Still the succeeding instrument, at least, arises or grows out of the preceding;

and if the root be cut off, the tree must fall. The acceptor or indorser of a forged bill of exchange, would be liable to an innocent holder, upon the principle of *estoppel*; but in case of an infant's bill of exchange, it would not be necessary to show that the holder had no knowledge of the infancy of the drawer. The acceptor or indorser of the bill of exchange of an infant, therefore, must be liable, on the ground that the bill is only voidable as against the infant. A lease of land by an infant is voidable and not void. This has long been the settled law.

Lord Mansfield says: "The *lessee* can in *no* case avoid the lease on account of the infancy of the lessor; which shows it not to be void, but only voidable." And he further affirms that "it is *better* for infants that they should have an election." (*Zouch v. Parsons*, 3 Burr. R. 1806. *Vide also Holmes v. Bogg*, 2 Mo. R. 552.) An infant shopkeeper who contracts for goods to sell again in course of his trade, or an infant who contracts for goods not necessities, or who borrows money, though he afterward actually lay them out in necessities, is clearly not absolutely liable for the payment of the goods or money; but as there is nothing to prevent him, when of full age, from ratifying the contract if he choose, such contract must be deemed only *voidable*, and not absolutely void. (*Bing. on Inf.* 29-31. *Vide also Van Winkle v. Ketcham*, 3 Caines' R. 323. *Lowe v. Griffith*, 1 Scott's R. 458. *Tuberville v. Whitehouse*, 11 Eng. C. L. R. 326.)

A security given by an infant is held to be voidable merely (*Cockshott v. Bennett*, 2 T. R. 366); and, in giving judgment, Judge Ashurst remarked, that the infant was bound in equity and in conscience to discharge the debt, though the law would not compel him to do so; but he may waive the privilege which the law gives him for the purpose of securing him against the imposition of designing persons; and if he choose to waive his privilege, the judge held that the subsequent promise would operate upon the preceding consideration. This reasoning leads to the conclusion that the security of an infant is only voidable; but it rather militates against the position that the want of apparent benefit to the infant is a criterion by which we can judge whether an instrument is void or voidable; for when a mere security for another is given by the infant no benefit has accrued or can accrue to him; there is neither apparent nor actual advantage. (*Vide Hinely v. Margaritz*, 2 Barr. R. 428. *Curtin v. Patten*, 11 Serg. & Rawle's R.

305.) A submission to arbitration by an infant is voidable, and may be avoided or affirmed at his election, even after the award is made. (*Jones v. The Phoenix Bank*, 8 *N. Y. R.* 228. *Barnaby v. Barnaby*, 1 *Pick. R.* 221. *Bretton v. Williams*, 6 *Munf. R.* 453.) Upon the same principle, the settlement of damages by an infant is voidable and may be avoided, although he may have received the damages he claims. They may be extremely inadequate to the injury, and the law will protect him as well against himself as against others. Thus, in one case of an assault and battery of an infant by an adult and an infant, which was settled between the aggrieved and the adult, and the amount fixed was actually received by the aggrieved infant, the court held, "that if the jury, on the trial, are convinced that the satisfaction received from the adult was a compensation for the injury, they will assess for the plaintiff but nominal damages. But if the compensation should be found inadequate, the jury will give such further sum as, with the money received from the adult, will amount to a reasonable satisfaction. The law very properly will not trust an infant to fix a value on his own rights, but this power is devolved on a jury who will do justice to all parties." (*Baker v. Lovett*, 7 *Mass. R.* 78.)

§ 17. The authorities are clear that a mortgage of an infant of his lands is voidable only, and may be enforced unless disaffirmed when he comes of age. (*The Boston Bank v. Chamberlain*, 15 *Mass. R.* 220. *The Eagle Fire Co. v. Lent*, 6 *Paige's R.* 635. *Hubbard v. Cummings*, 1 *Greenl. R.* 11. *Roberts v. Wiggins*, 1 *N. H. R.* 73. *Palmer v. Miller*, 25 *Barb. R.* 399.)

The contract of an infant to perform labor and service is voidable, and in an action brought by the infant for services performed under it he will be entitled to recover such sum as he would be entitled to had there been no express contract made; on the assumption that there is no express contract at all. (*Whitmarsh v. Hall*, 3 *Denio's R.* 377.)

The agreement and partition of lands by an infant is voidable, and may be either affirmed or disaffirmed by him on his attaining full age. (*Overbach v. Heermance*, *Hopk. R.* 337. *Rainsford v. Rainsford*, *Spears' Eq. [S. C.] R.* 385.)

The contract of marriage by an infant is voidable only at the election of the infant. (*Hunt v. Peake*, 5 *Cow. R.* 475. *Hamilton v. Lomax*, 26 *Barb. R.* 615. *Holt v. Ward*, 2 *Strange's R.* 937.)

After the contract is consummated by the marriage, of course, it cannot be repudiated, but is as solemnly binding upon the parties as though they were adults at the time of its consummation.*

It has also been held that an executed compromise by an infant of a claim against him is voidable, and that in such a case the acts of the infant may be inquired into for the purpose of seeing whether they are beneficial to his interest or not. (*Pitcher v. The Turin Plank-Road Co.* 10 Barb. R. 436.)

It was formerly supposed that a *surrender* by an infant was absolutely void, but Lord Mansfield set the matter right by deciding the precise question and holding that it was only voidable. His language was: "I know of no judgment upon the ground that such a surrender is void. Most undoubtedly the *other* party cannot say no. If an infant were to surrender an unprofitable lease, and after acceptance the premises should be burned, overflowed, or otherwise destroyed, the *lessor* never could say the surrender was void. There is no instance where the *other* party to a deed can object on account of infancy; consequently the infant may let the surrender stand or avoid it; which proves it to be *voidable*. If a *new* case should arise, when it would be more beneficial to the infant that the deed should be considered void, if he might incur a forfeiture to be subject to damages, or a breach of trust in respect to a third person *unless* it was deemed void, the very principle of the privileges and disabilities attached to infants would warrant an exception in such case to the general rule." (*Zouch v. Parsons*, 3 Burr. R. 1806.)

Lord Coke lays down the rule that an exchange of land made by an infant is only voidable, because the occupation of the land taken in exchange is tantamount to livery, and also in respect to the recompense. (*Co. Litt.* 51, b.)

It has always been held that judicial acts of the infant, such as fine, recovery, statute, recognizance, are only voidable, and that in a manner much more limited than other acts, because of the

* This statement is made with the qualification that the contract of marriage be consummated after the infant attains to the age of discretion, which, by the common law, is fourteen years in males, and twelve in females. If the marriage occurs before the age of legal consent the contract may be avoided upon the infant arriving at maturity (*Ayman v. Robb*, 3 Johns. Ch. R. 49), though it must be done at once, because if the parties still continue to live together after that period it will be then too late to disaffirm the contract. So also a voluntary distribution of an intestate's estate is not absolutely binding upon an infant, and may be avoided or ratified by the infant on coming of age. (*Ketcham v. Shelby*, 23 Miss. R. 161.)

solemnity with which they are accompanied. (*Vide Bing. on Inf.* 43, 44, and cases cited.) And it may be affirmed that all judicial acts against an infant, such as judgments and decrees without a guardian *ad litem*, and recognizances, are only voidable. (*Porter's heirs v. Robinson*, 3 *Marshall's R.* 253. *Allison v. Taylor*, 6 *Dana's R.* 87. *Bloom v. Burdick*, 1 *Hill's R.* 30. *Austin v. Charlestown Female Seminary*, 8 *Metcalf's R.* 196, 203. *Patchin v. Cromach*, 13 *Vt. R.* 330.)

It has been decided that an infant is not bound by his contract, either parol or by deed, to pay a *sum certain*, even for necessities, for he is not to be precluded by the form of his contract from his right of estimating the actual worth of the articles supplied, beyond which he is not bound. (*Story on Contracts*, § 81. *Beebe v. Young*, 1 *Bibb's R.* 519, 520. *Vent v. Osgood*, 19 *Pick. R.* 572. *Mitchell v. Reynolds*, 10 *Mod. R.* 85.)

An infant is liable in damages for a tort, but his promissory note given as compensation for such damages cannot be enforced. (*Hanks v. Deal*, 3 *McCord's R.* 257.)

The conveyance of an infant of land is voidable only. (*Johnson v. Rockwell*, 12 *Ind. R.* 76. *Jenks v. Jenks*, 12 *Iowa R.* 195.)

Many other authorities might be cited upon the subject of contracts of infants which are voidable only, but perhaps none that enunciate any principle not covered by those already cited. It is presumed that with the light of these cases a ready determination of the question may be made, whenever and wherever it may arise.

It may be remarked that the infant may avoid his voidable contracts, even though the party dealing with him supposed him to be of age; or the infant fraudulently represented himself to be of age; or the infant was in business, and in the habit of contracting for himself. (*Van Winkle v. Ketcham*, 3 *Caines' R.* 323. *Conner v. Birdsall*, 1 *Johns. Cas.* 127. *Stoolfoos v. Jenkins*, 12 *Serg. & Rawle's R.* 399, 403. *Burley v. Russell*, 10 *N. H. R.* 184. *Hinel v. Masterson's Adm.* 1 *Bibb's R.* 330. *Curtin v. Patton*, 11 *Serg. & Rawle's R.* 309. *Houstin v. Cooper*, *Pennington's R.* 866.) In none of these cases can the contract be enforced against the will of the infant, though the infant may be liable in tort for his fraudulent acts.

§ 18. But Professor Parsons lays down the rule in general terms, that "the contract of an infant (if not for necessities) is voidable;" that is, he may disavow it, and so annul it, either before his

majority or within a reasonable time after it (*Parsons' Mercantile Law*, 4); and in a note appended to this declaration, while frankly admitting that the rule that those contracts are voidable only which are for the infant's benefit, and those which are prejudicial are absolutely void, is adopted and recognized by many authorities, advances the opinion that this distinction is now practically obsolete, and unqualifiedly asserts that the more recent authorities hold that all acts and contracts of infants (except, perhaps, the appointment of an attorney) are *voidable* only, and not absolutely *void*. (*Ib.* note 4.)

Now it is admitted that the *tendency* of modern decisions is as indicated by Professor Parsons; but it is, nevertheless, respectfully suggested, that the authorities holding, for example, that a release from an infant to his guardian, or that an infant's release of a legacy is absolutely void, have never been definitely overruled. If it could be substantiated that this rule were generally recognized by the courts, it would have the effect to save much labor and research. But in view of the facts above suggested, it will be safe for the present to bear in mind the principles and tests laid down, and the authorities upon the subject, which have never been overruled. The exception in favor of the appointment of an attorney, is open to criticism, as well as the other cases in which the acts of the infant are, by the authorities, held void. The reason often assigned is, that if the power of attorney authorizes the conveyance of land, *it must be prejudicial to the infant*, which, under the rule laid down, makes the contract void, but it is not readily discovered why authorizing *another* to convey should *necessarily* be more to his prejudice than conveying himself; and yet it is agreed on all hands, at the present day, that his own conveyance is only voidable, and not void. But this exception itself does not always obtain, for if the power of attorney authorizes the reception of seisin of land, it is then only voidable, and not void. Analogy would indicate that the same rule should hold to this, as to all other contracts, and that a warrant of attorney should be no more void, *per se*, than any other contract; but it is admitted that the authorities have established a different rule, and we humbly submit to it. (*Bing. on Inf.* 19; note 6.) This anomaly, however, is confined to sealed instruments, and *parol* authority to transact business for an infant, as we have seen, is not void, but voidable merely. (*Whitney v. Dutch*, 14 *Mass. R.* 463.)

So it still continues to be laid down by elementary writers upon contracts, like Chitty, Comyn and Story, that some contracts of infants are binding, some voidable only, and others absolutely void, to be determined by certain tests and criteria which are laid down.

CHAPTER IV.

BY WHOM, AND AT WHAT TIME, VOIDABLE ACTS OF INFANTS ARE TO BE AVOIDED.

§ 19. THE privilege conferred by law upon infancy is a personal privilege, and it is declared by Bingham, and other elementary writers, that no one can take advantage of the relation but the infant himself, and such at least is the *language* of the earlier authorities upon the subject. (*Bing. on Inf.* 49. *Keane v. Baycott*, 2 *H. Bl. R.* 511. *Van Bramer v. Cooper*, 2 *Johns. R.* 279. *Jackson v. Todd*, 6 *ib.* 257. *Slocum v. Hooker*, 13 *Barb. R.* 536. *Alsworth v. Cordtz*, 31 *Miss. R.* 32. *Oliver v. Horedlet*, 13 *Mass.* 237.) It is more accurate to say, however, that as a general rule no one but the infant himself, or his legal representatives, executors and administrators, can avoid the voidable acts, deeds and contracts of an infant, for, while living, he ought to be the exclusive judge of the propriety of the exercise of a personal privilege intended for his benefit; and, when dead, they alone should interfere who legally represent him. (2 *Kent's Com.* 237. *Smith v. Mayo*, 9 *Mass. R.* 62. *Hussey v. Jewett*, *Ib.* 100. *Martin v. Mayo*, 10 *ib.* 137. *Jackson v. Mayo*, 11 *ib.* 147. *Parsons v. Hill*, 8 *Mo. R.* 135. *Jefford v. Ringold*, 6 *Ala. R.* 544.) The rule would extend to privies in blood of the infant, but not to his assignees or privies in estate only. (*Bac. Abr. Infancy*, 6. *Hoyle v. Stowe*, 2 *Dev. & Battle's [N. C.] R.* 323. *Austin v. Charles-town*, 8 *Metc. R.* 196. *Breckinridge's Heirs v. Ormsby*, 1 *J. J. Marsh. [Ky.] R.* 236.)

It follows, from the rule, that, though the contract of an infant be voidable, yet it is binding on a person of full age who contracts with him. The indulgence which the law allows infants, to secure them from the fraud and imposition of others, can only be intended for their benefit, and is not to be taken advantage of by persons of riper years, who are presumed to act with sufficient prudence.

If it were otherwise, this privilege, instead of being a protection to the infant, might, in many cases, turn greatly to his detriment. (*Bing. on Inf.* 49.) Every person, therefore, deals with an infant at arms-length, at his own risk, and with a party for whom the law has a jealous watchfulness. (*Story on Con.* § 13.)

Infancy, and the burden of proving it, rest upon the person setting it up. (*Campbell v. Wilson*, 23 *Texas R.* 267.)

§ 20. The authorities are quite numerous to show that an adult cannot disaffirm his contract with an infant, but only a few will need to be referred to. Among the earlier cases, where an infant brought an action on a contract for the sale of some grass, the defendant was not permitted to arrest judgment, on the ground that the plaintiff, being an infant, the defendant was not bound by his agreement. (*Smith v. Bowin*, 1 *Mod. R.* 25.) So on a promise to an infant to do such an act, on consideration that the infant promised to pay such a sum, in assumpsit by the infant, he had judgment, though the money was not paid; for the court held that the infant's promise was only voidable at his own election, and not at the election of him to whom it was made. (*Forester's Case*, 1 *Sid. R.* 41.) A man of full age and a female of fifteen promised to intermarry, and, after request by her, he married another woman; an action on the case was brought against him for the violation of the contract. The man objected that the agreement was *nudum pactum*, and not reciprocal, as he could not compel her while an infant to perform her promise; but the court held that the infant's promise was only voidable at her own election and not at the election of him to whom it was made; and therefore the action was sustained. (*Holt v. Ward*, 7 *Strange's R.* 937.)

This doctrine in *Strange* has been expressly approved by the supreme court of the State of New York, and others of the American States. (*Hunt v. Peake*, 5 *Cow. R.* 475. *Vide also Willard v. Stone*, 7 *ib.* 22. *Cannon v. Alsberry*, 1 *A. K. Marsh. [Ky.] R.* 76. *Wamith v. Cooper*, 5 *Sneed's [Tenn.] R.* 659. *Pool v. Pratt*, *Chip. [Vt.] R.* 252.) In another case, an infant brought an action of covenant, and set forth in her complaint that she had covenanted to serve the defendant seven years, and that the defendant had covenanted to teach her to sing and to dance, and to find meat, drink, washing and lodging, and that the defendant, within the time, turned her out of the house, and did not teach her to sing and dance. It was objected, in arrest of judgment, that the covenants being recipro-

cal, and the infant not bound by her covenant, neither could the mistress be by hers. But the court held that though the contract might be avoided as to the infant, yet it bound her mistress, who was of full age. (*Farnham v. Atkins*, 2 *Kib. R.* 623.)

It will not be necessary to refer to more of the older authorities on this subject. Those referred to will suffice.

§ 21. The more modern authorities holding that the adult contractor with an infant is liable upon his contract are not so numerous as the more ancient, and yet the question is well settled.

In a case which came before the court of errors of the State of New York in 1835, the chancellor (Walworth), who gave the leading opinion, said: "As to the adult party, a joint promise made by him and the infant is binding as a joint contract; and a recovery may be had against him upon a declaration stating it as a joint contract made by him and the infant, although the infant avails himself of the defense of infancy." (*Mason v. Davidson*, 15 *Wend. R.* 66.) The same doctrine was sanctioned by a majority of the court of appeals of the State of Virginia. (*Cole v. Pennel*, 2 *Rand. R.* 178.)

In another case, in the supreme court of New York, Harris, J., sitting at special term, says: "It is also a general rule that no one but the infant himself can avoid his voidable contract. If, therefore, the contract of an infant be voidable merely, and the infant alone can avoid it, how can it be treated as void until the infant had made his election to disaffirm it." (*Slocum v. Hooker*, 12 *Barb. R.* 564.) And on re-examination of this same case at general term, Parker, J., said, "If a promise by an infant were absolutely void, it would form no consideration for a promise made to him. But it is well settled that an infant may maintain an action on his contract." (*Slocum v. Hooker*, 13 *Barb. R.* 537.)

In Indiana it has been held that an adult contracting with an infant for the conveyance of land is bound by the agreement, and must pay the contract price and take the infant's deed. (*Buson v. Carlton*, 13 *Ind. R.* 354.)

The cases not only hold that the adult contractor is liable upon his contract with an infant, but that an adult joint contractor cannot avail himself of the objection that his co-contractor was an infant. There is, therefore, no question, upon authority, that all parties dealing with an infant, whether as co-contractors with him or as adverse parties, are liable upon such contracts, co-contractors

in any event, and adverse parties, until the contract is disaffirmed by the infant. In England it has been held that the infancy of one of several joint contractors may be set up to defeat the action as to the infant, but that this is no discharge to a separate action against the others. (*Gillow v. Lillie*, 27 *Eng. C. L. R.* 548.) And further, that the infancy of the payee of a bill of exchange is no answer to an action against the drawer by the indorser (*Grey v. Cooper*, 26 *Eng. C. L. R.* 36); but that the confession of infancy on the record bars a joint action ex-contractu. (*Boyle v. Webster*, 79 *Eng. C. L. R.* 950.)

§ 22. For the same reasons which bind the adult party dealing with infants, as a general rule, none but the infant himself or his personal representatives, privies in blood, can avoid a voidable act, contract or conveyance of the infant. A few of the adjudicated cases will sufficiently illustrate the rule. Thus, it has been held that if an infant seised in fee make a feoffment and die, his heir may enter; and if seised in tail male, he make a feoffment and die, his son, being heir, general and special, may enter. (*Whittington's case*, 8 *Coke's R.* 42 b, 43 a.) If the infant be attainted of felony after the feoffment, Lord Coke says that the issue would be driven to his formedon, for his entry is not lawful in respect of his estate only, but of his blood, which is corrupted. (*Co. Litt.* 337 a.) But in some of the cases it is said that the issue may enter. (*Vide Whittington's case*, *supra*.) And if such infant tenant in tail have no sons, but only daughters, his brother, being special heir, "*per formam doni*," made to his father, may avoid the feoffment, because he is privy in blood, and has the land only by descent. (*Ib.*)

In one case in the State of Massachusetts the guardian of an infant undertook to avoid the sale of personal property by his ward, but Wilde, J., said: "But it has been further argued that these sales, if voidable, may be avoided by the plaintiff, Clap, by virtue of his authority as guardian of the minor. No case has been cited in support of this position, and we know of no position of law by which it can be maintained. The authority and interest of a guardian extend only to such things as may be for the benefit and advantage of the ward. If an infant makes a contract from which he derives a benefit, it cannot be avoided by his guardian, for this, being injurious to the infant, would be a violation of the guardian's duty. (*Oliver v. Horedlett*, 13 *Mass. R.* 239.)

§ 23. The rule that privies in estate simply shall not take advantage of the act of the infant, is well settled, both by adjudications in this country and in England. It has been decided that if a donee in tail, within age, make a feoffment in fee, and die without issue, the donor shall not enter, because there was privity between them only in estate, and no right of entry accrued to the donor by the death of the donee. So if two joint tenants be in fee, within age, and one makes a feoffment in fee of his moiety, and dies, the survivor cannot enter by reason of the infancy of his companion, for by his feoffment the jointure was severed, so long as the feoffment remained in force; and therefore in such case the heir of the feoffer shall have "*dum fuit infra ætatem*," or shall enter into the moiety. But if two joint tenants be within age, and they join in a feoffment, in such case a joint right remains in them; and therefore if one dies, the right shall survive; the survivor shall have the right of the land as from the first feoffee, and may enter in respect of the right accrued to him. (*Whittington's case*, 8 *Coke's R.* 43.) In another case, however, Doddridge, J., thought the donor might enter, because he could not bring his "*formedon*," and, therefore, without entry, would have no remedy. (*Palmer's R.* 254.) But it does not appear why, in such case, the donor should not bring his "*formedon*"—a writ formerly used to recover entailed property. If he could not bring it, because or while the feoffment of the infant was voidable, yet there seems to be no reason why he should not bring it, when, by the death of the infant without issue, the tortious feoffment was confirmed, or at least past avoidance. This is the reasoning of Mr. Bingham (*Bing. on Inf.* 53, *note m*), and though we do not have this writ, in a technical sense, in this country, the same principle is frequently involved in cases of the present day. If an infant seised in right of his wife, make a feoffment and die, his heir cannot enter, because no right descends to him; but inasmuch as the baron, if he had lived, might have entered in right of his wife only, and not in respect of any right which her husband had, the wife might, in such case, have entered in her own right. (*Whittington's case*, *supra*.) But if the feme, being only a tenant in tail, the baron within age, had made a gift in tail to another, by which the baron gained a new reversion in fee, and died, the wife might enter, or the heir of the baron, who had a new reversion descended to him. But if the heir entered, as it could only be to defeat the tail given by the infant, his estate

vanished; and, by operation of law, the feme was immediately seised of her old estate. (*Whittington's case*, 8 *Coke's R.* 43.)

In the case before Lord Mansfield, often referred to, it was held that where a tenant for life and an infant in remainder levied a fine, the infant might reverse the fine as to himself for the inheritance for nonage, but that the tenant for life was bound by his assent to the fine and joining in it, not to enter for the forfeiture, on the principle that the privilege of the infant being as a *shield*, and not as a *sword*, "shall not be turned into an offensive weapon of *fraud* or *injustice*." (*Zouch v. Parsons*, 3 *Burr. R.* 1802.) And in a case before the courts of North Carolina, it was held that privies in estate simply could not avoid the infant's deed. (*Hoyle v. Stowe*, 2 *Dev. & Battle's R.* 323.)

§ 24. It is held that privies in law, as the lord by escheat, are equally incapable as privies in estate, of avoiding a conveyance made by an infant. On this principle, if an infant make a feoffment and die without heir, the law is not permitted to avoid it. In one case however in which this rule was stated, it appeared that the feoffment of the infant was made *by attorney*, and so was absolutely *void*, and the court resolved that the land should escheat. (*Whittington's case*, 8 *Coke's R.* 44.) The heir or executor, sued on the infant's bond, may avoid it by pleading the infancy of the obligor. The heir is privy in blood, and the executor stands exactly in his testator's place, and both avoid the instrument in respect of the estate transmitted. (*Bing. on Inf.* 55.) The heir is, of course, clearly within the letter of the rule, and the executor is within the *spirit* of the rule, by *conventional relation*.

§ 25. As to the time of avoiding voidable acts, it may be observed, that the infant's privilege of avoiding acts performed with judicial solemnity, and constituting matters of record, as fines, recoveries and recognizances, is much more limited, in point of time, than his privileges of avoiding matters *in pais*, or matters not judicial. The former must be avoided by the infant himself, and during his minority, and by some act of record, as by a writ of error, or an *audita querela*. (*Tucker v. Moreland*, 10 *Peter's R.* 71.) This was always the rule in England, because the fact of infancy was anciently tried by *inspection*, which is not a part of our law. (20 *Am. Jur.* 258.) But the rule however prevails in this country, as well as in England, that in such cases the matter must be avoided during infancy. (*Tucker v. Moreland*, *supra*.)

Breckinridge's Heirs v. Ormsby, 1 J. J. Marsh. 252.) From the nature of the case, it must be so, because after full age, infancy or not, when the act occurred, must be tried by a jury and nothing can be averred against the record, which implies that the act occurred after full age, or that the person could not have suffered a common recovery whilst he was a minor. Besides the act must be vacated with the same solemnity that it was entered into. (*Bing. on Inf.* 56, and cases cited.) It has been accordingly held that if an infant suffer a common recovery, in which he comes in as a voucher in his proper person, he may in a writ of error avoid it, because it is error; yet, at his full age, he cannot enter into the land, and avoid it by entry before he has reversed the recovery by writ of error, for judgments are not to be subverted by matter "*in pais*," without matter of record. (*Ib.*) Though if an infant appear *by attorney*, and suffer a recovery, it may be reversed for this error, after the infant comes of age; because it may be tried by the country, whether the warrant of attorney was given under age or not; and not be tried by inspection of the court like the fact of nonage. (*Roby v. Robinson*, 1 *Levinz's R.* 142. *Roby v. Robinson*, 1 *Sid. R.* 321.) And if a feme-covert, being under age, levies a fine which she afterward wishes to reverse, she may be brought into court by *habeas corpus*, in order to her inspection; and it seems the fine may be set aside on motion, for the husband may not be willing, nor permit her to proceed by writ of error. (*Hutchinson's case*, 3 *Levinz's R.* 36.)

These rules with respect to *finer and common recoveries* may be regarded as of little or no practical importance at the present day, from the fact that alienation by matter of record is not now known in practice, either in England or in many of the American States. It is true that fines and recoveries have been swept away by a recent statute in England, and more simple modes of assurance have been substituted; and the conveyance by common recovery, formerly in use in many of the United States, has become obsolete with the disuse of estates tail; and yet the doctrine of uses still prevails in *some* of the states, and a process *similar* to fines and recoveries is still somewhat in use. At all events, the *principle*, so far as infants are concerned, it is well to understand. Questions involving the principle frequently arise, even where fines and recoveries are abolished by statute. A judgment recovered against an infant, who appeared in the action by attorney, may be set aside

by the infant when he attains full age, by a writ of error. (*Powell v. Gott*. 13 *Mass. R.* 458.)

§ 26. Conveyances of real property by an infant, either in fee, for life or years, cannot be avoided or disaffirmed until the infant attain to full age. (*Roof v. Stafford*, 7 *Cow. R.* 183.) It has been held, however, that in the mean time the infant may enter the premises and take the profits. (*Bool v. Mix*, 17 *Wend. R.* 119.)

So, also, it has been held that, though an infant cannot avoid his deed of real estate until he come of age, yet he may, by his next friend or guardian, as the practice requires, bring an action in equity, during minority, and get a receiver of the rents, issues and profits appointed. (*Mathewson v. Johnson*, 1 *Hoff. Ch. R.* 560.) So in England it was held that, if an infant make a feoffment, he may avoid it by entry, either within age or at full age; and if he dies, his heir may enter or have a "*dum fuit infra ætatem*." That the feoffment being a conveyance performed with much greater solemnity than any other, the infant cannot, as in case of a lease, surrender a grant, have an assize, or bring trespass, before he has avoided the feoffment by entry; for it is presumed, in favor of such solemnity, that the assembly of the heirs then present would have prevented it if they had perceived his nonage; and, therefore, the feoffment shall continue until defeated by entry, which is an act of equal notoriety. But it was at the same time decided that, though the infant may avoid his feoffment by entry during his nonage, yet he cannot have a "*dum fuit infra ætatem*" till he comes to his full age; for it is said that he is allowed to enter, that he may save to himself the profit in the mean time, though such entry, being the act of an infant, seems to be as voidable at full age as his feoffment. But if he were to recover in a writ of "*dum fuit infra ætatem*," the judgment would bind his election, and therefore it can only be brought when he comes of full age. (*Bing. on Inf.* 60 and 61, and cases cited.)

The consequence of this doctrine would seem to be, that the feoffment still continues capable of confirmation at full age, notwithstanding such entry, which is similar to the rule in this country as extracted from the cases of *Bool v. Mix* and *Mathewson v. Johnson*, above referred to. It is suggested, however, that this is about equivalent to allowing the infant to make his final election during minority, for if he was disposed to confirm the feoffment at full age,

he would, at the same time, be willing to make an absolute conveyance, which would amount to the same thing.

§ 27. If the heir, within age, assign to the wife more land in dower than she ought to have, he himself may have a writ of admeasurement of dower at full age, by the common law. So if after such assignment the heir die, his heir may have such writ to rectify the assignment. And if the heir, within age, before the guardian enters, assigns too much in dower, the guardian may have a writ of admeasurement of dower, though the heir, in whose time the assignment of too much was by the guardian, cannot have such writ till his full age, for the reason that until then the interest of the guardian continues. (*Bing. on Inf.* 62, 63, and cases cited.)

It is well to remember that in all these cases of real property where the act of the infant cannot be disaffirmed until he attain to full age, such disaffirmance must be made before his entry shall be barred by the statute of limitations. In the State of Illinois it has been held that a minor must disaffirm his deed within three years after he becomes of age. (*Blankenship v. Street*, 25 Ill. R. 132.)

§ 28. It may be stated as a universal rule, that all executory contracts, which are voidable on the ground of infancy, may be disaffirmed during infancy by the minor as well as after he has attained to full age. So, also, all contracts respecting property, which are executed by delivery of some article, on payment of money, may be rescinded by the infant, both before and after the time of his coming of age; though such disaffirmance will in no case avail after the statute of limitations has fully run. (*Vide Lessee of Drake v. Ramsey*, 5 Ohio R. 251. *Cresinger v. Welch*, 15 ib. 156.)

In a case in England, the chief justice observed that in every instance of a contract, voidable only by an infant on coming of age, he is bound to give notice of disaffirmance of the contract in a reasonable time. (*Holmes v. Blogg*, 8 Taunt. R. 35.) But by the authorities in this country, it would seem ordinarily that a conveyance of real estate, by an infant, may be disaffirmed at any time, so long as an action of ejectment is not barred by the statute of limitations. (*Drake's Lessees v. Ramsey*, *supra*.) Still, in the State of Vermont, it was held in one case when all the equities were against the act of disaffirmance, that the infant was bound by

his voidable contracts, unless disaffirmed within a reasonable time, and that eleven years past majority was not a reasonable time. (*Bigelow v. Kinney*, 3 *Vt. R.* 353.)

It is declared by statute, in the State of South Carolina, that minors shall have five years after their coming of age to prosecute their claims to land, and four years to prosecute personal claims; and this, whether within or out of the state, when coming of age. But if an action be commenced for the recovery of land within the five years, a nonsuit, or verdict, shall not be conclusive against him, but he may at any time within two years commence an action for the same land. (*Edson v. Davis*, 1 *McCord's R.* 555. *Rose v. Daniel*, *Const. R.* 549.)

Bingham states the rule that, "as to all other conveyances *in pais*, except enfeoffments, whether in fee, tail, for life, or years, it seems the infant or his representative, may avoid them by trespass, assize, or entry, within or after age; or by '*dum fuit infra ætatem*,' after age, or death within age; and this '*dum fuit infra ætatem*' lies in the *pro*, in the *pro and cui*, or in the past." And he says, "a surrender of a copy-hold estate may be avoided in like manner," and refers to numerous authorities to sustain his position. (*Bing. on Inf.* 62.)

Mr. Bingham further lays it down that, "obligations, and dues in general, may be avoided at any time, by pleading nonage; but it must be specially pleaded, and cannot be give in evidence under the general '*non est factum*,' because these deeds have an operation from the delivery." And further, he says, "parol agreements, or contracts, may be avoided within or after age, by pleading the general issue, '*non assumpsit*,' and giving infancy in evidence under it. Infancy may also be specially pleaded in this action; and payment of money into court will not preclude a defendant from availing himself of nonage, because the money may have been paid into court for necessities." (*Ib.* 63, 64.)

§ 29. In a leading case in the court of errors in the State of New York, Jones, Chancellor, said: "The general rule is that an infant cannot avoid his contract executed by himself, and which is therefore voidable only while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant, or the object of his privilege, which is intended for his protection, would not be answered." He then says: "The true

rule, then, appears to me to be this: that when the infant can enter and hold the subject of the sale till his legal age, he shall be incapable of avoiding till that time; but when the possession is changed, and there is no legal means to regain and hold it in the mean time, the infant, or his guardian for him, has the right to exercise the power of rescission immediately." *Stafford v. Roof*, 9 *Cow. R.* 628.)

This case is an authority in favor of the doctrine that an infant may avoid his sale of chattels before or after he is of full age, and the same doctrine is reiterated in a later case in the superior court of the same state, one of the head-notes to which is: "It seems a sale and manual delivery of chattels by an infant may be avoided while under age." (*Bool v. Mix*, 17 *Wend. R.* 119. *Vide also Shipman v. Horton*, 17 *Conn. R.* 481.)

And it may be stated as a general proposition that all contracts of a personal kind or relating to personal property may be avoided under age and immediately, otherwise irreparable injury might follow. (*Stafford v. Roof*, *supra*. *Willis v. Twambly*, 13 *Mass. R.* 204. *But vide dictum contra in Brady v. McKenney*, 23 *Maine R.* 517, 525, and *vide Farr v. Sumner*, 12 *Vt. R.* 28, 31. *Shipman v. Horton*, 17 *Conn. R.* 481.)

§ 30. With respect to the time, therefore, when the voidable acts of an infant may be disaffirmed or avoided, it may be regarded as well settled by the authorities, both in England and in this country, that all executory contracts and all contracts respecting property, which are executed by delivery of some article, on payment of money, including, of course, all sales of personal chattels, may be avoided or disaffirmed by the minor, both before and after the time of his coming of age; but that conveyances of real property by feoffment on delivery of the deed, which comes in lieu of payment, or by any other conveyance of such property in fee for life or years, cannot be avoided before the infant attains to full age, and that as to the party by whom the voidable acts of the infant may be disaffirmed or avoided, the true rule is that no one but the infant himself, or his legal representatives, executors and administrators, possess or can be permitted this privilege or right.

CHAPTER V.

IN WHAT MANNER VOIDABLE ACTS OF INFANTS ARE TO BE DISAFFIRMED OR AVOIDED—EFFECT OF THE DISAFFIRMANCE OF VOIDABLE ACTS OF INFANTS.

§ 31. THE manner in which the acts of an infant may be disaffirmed, is by an action to recover the property conveyed or assigned, and setting up the infancy of the grantor, vendor or assignor, in answer to the conveyance; or when sued to enforce his executory contracts, by pleading specially his infancy as a defense. The infant may also disaffirm his conveyance of real estate, by a reconveyance of the same premises to a third person; but in this case, in order to constitute a disaffirmance, the second deed must be so inconsistent with the first, that both cannot consistently stand. So the infant may disaffirm his sale of personal chattels by a resale of the same chattels to a third person.

The contract for service by an infant may be disaffirmed by leaving his employer and entering into the service of another.

The books seem to leave the question in some obscurity, when and to what extent a positive act of confirmation on the part of the infant is requisite in order to render his acts perfect; but in regard to his *disaffirmance*, there need be no difficulty, for the reason that this simply requires some positive and decided act of dissent, adverse to the original act. (*Vide Harris v. Wall*, 1 *Wels. Hurl. & Gor. R.* 122, 128.) And generally it may be affirmed that the original contract or act must be vacated with the same solemnity that it was entered into; and in every case it must be by some act clearly demonstrating the design of the infant to renounce his former engagement or transaction. A judicial proceeding or matter of record can be avoided on account of infancy only by matter of record, within the rule above stated. A judgment entered against an infant without a guardian *ad litem*, may be reversed by writ of error after full age, and the trial is *per pais*. (*Stiver v. Shelback*, 1 *Dallas R.* 165. *Vide also Swan v. Horton*, 14 *Gray's [Mass.] R.* 179. *Crockett v. Drew*, 5 *ib.* 399.)

In Arkansas it has been held that a judgment entered against an infant cannot be avoided by any act *in pais*, but only by some matter of record. (*Trapnall v. State Bank*, 18 *Ark. R.* 53.)

In Virginia it is error to take judgment against an infant defendant who is not stated in the record to have appeared by guardian

ad litem. (*Fox v. Cosby*, 2 *Call's R.* 1. *Roberts' Widow v. Stanton*, 2 *Munf. R.* 129. *Brown v. McKee's Ex'r*, 4 *ib.* 439. *Cole v. Pennell*, 2 *Randolph's R.* 174.) But a decree obviously for the benefit of the infant, will not be set aside. (*Brown v. Armistead*, 6 *ib.* 595.)

In New York the taking of a judgment against an infant defendant for want of an answer, without appointing a guardian *ad litem*, is an irregularity, and the judgment will be set aside on motion, without terms, even though the plaintiff had no knowledge that the defendant was a minor. (*Kellog v. Klock*, 2 *Code R.* 28.) The rule is the same in Indiana. (*Simmons v. Simmons*, 6 *Ind. R.* 8.) And the same doctrine prevails in Missouri. (*Randall v. Wilson*, 24 *Mo. R.* 76.)

§ 32. In a case in the late court of chancery of the State of New York, it appeared that an infant conveyed certain real estate to a party, who, intervening the time of the conveyance and the coming of age of the infant, mortgaged the land to one party and afterward conveyed it to another, and the latter party took a quitclaim deed from the infant grantor, and on bill filed to foreclose the mortgage, undertook to overreach the mortgage, claiming that the deed to him was a disaffirmance of the deed to the mortgagor, the original grantee of the infant; but the chancellor held that the deed from the infant subsequently to his coming of age, to the grantor of the infant's original grantee, was intended to operate as a mere confirmation of the former title, and not as a disaffirmance of the previous deed, and then laid down the rule that "to render a subsequent conveyance by an infant an act of dissent to his prior deed, it must be inconsistent therewith, so that both cannot properly stand together." (*Eagle Fire Company v. Lent*, 6 *Paige's R.* 635.) So in a case in the supreme court of the same state, where an infant had sold his personal property, and delivered it to the purchaser, but, notwithstanding, brought his action for the thing sold, the bringing of the action was held a disaffirmance of the sale, and the infant was permitted to recover. (*Roof v. Stafford*, 7 *Cow. R.* 179. *Vide also Shipman v. Horton*, 18 *Conn. R.* 481.)

In another case in the same court it appeared that an infant conveyed lands which were in an uncultivated state, and after he became of age, the lands being still unoccupied, conveyed the same to another person, and the deed was duly registered, it was held that the last deed was a disaffirmance and complete avoidance of the

first. (*Jackson v. Carpenter*, 11 *Johns. R.* 539.) The conveyance in this case was not attended with all the solemnities of a feoffment and livery, and it was accordingly declared to be defeated by the second deed, which was an act of the same description and of equal notoriety with the first conveyance. Had the infant given livery of seisin he could have manifested his dissent only by an entry upon the land. When the first grantee is in possession, claiming and holding under his deed from the infant, a second deed would be an act of maintenance and not effectual to reconvey the premises. But when the infant conveys by a simple bargain and sale, a second deed after the infant comes of age is a disaffirmance of the first. (*Vide Jackson v. Bouchin*, 14 *Johns. R.* 127. *Jackson v. Todd*, 6 *ib.* 257, and *Roberts v. Wiggins*, 1 *N. H. R.* 75.)

It has been held in some of the states that the conveyance of real estate by an infant may be disaffirmed after full age by a conveyance to another person, without entry and without restoring the purchase-money. (*Pitcher v. Laycock*, 7 *Ind. R.* 398. *Peter-son v. Laik*, 24 *Miss. [3 Jones] R.* 541.

In still another case in the supreme court of the State of New York the rule is laid down upon authority that "when an infant executes a conveyance of his real estate he may avoid it on coming of age, and recover by action what he has thus conveyed. So when an infant sells his personal property and delivers it to the purchaser, he may, notwithstanding, avoid the sale, and bring an action for the thing sold." (*Medbury v. Watrous*, 7 *Hill's R.* 113.) And in a leading case in the supreme court of the United States, Mr. Justice Story, who delivered the opinion, said: "There is no doubt that an infant may avoid his act, deed or contract by different means, according to the nature of the act and the circumstances of the case. He may sometimes avoid it by matter *in pais*, as in case of a feoffment by entry, if his entry is not tolled; sometimes by plea, as where he is sued upon his bond or other contract; sometimes by suit, as when he disaffirms a contract made for the sale of his chattels and sues for the chattels; sometimes by a writ of error, as when he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as when he has acknowledged a recognizance or statute, staple or merchant; sometimes, as in the case of an alienation of his estate during his nonage, by a writ of entry, *dum fuit infra ætatem*, after his arrival of age." (*Tucker v. Moreland*, 10 *Peters' R.* 71.) In another case in the supreme court of the State

of New York, when it appeared that an infant had contracted to serve the defendant a certain time, and had performed labor under his contract, when he abandoned it, and brought an action by his next friend to recover the actual value of his labor, the court held that this was a disaffirmance of the contract, and the plaintiff was permitted to recover, and the defendant's offer to recoup damages for the avoidance of the contract was overruled. (*Whitmarsh v. Hall*, 3 *Denio's R.* 375.) And in the State of Indiana it was held that an infant may recover for services performed by him under a special contract not fulfilled, and the rule was declared the same as in New York. (*Van Pelt v. Corvine*, 6 *Ind. R.* 363.) But in the State of Alabama it was held that if an infant disaffirm his contract of sale on arriving at full age, and sue the vendee for use and occupation, the latter may recoup for valuable improvements erected on the land, and this certainly would seem to be a very sensible rule. (*Weaver v. Jones*, 24 *Ala. R.* 421.)

§ 33. In a late case in the superior court of the city of New York it was held that the deed of an infant is not, as a matter of course, superseded and annulled by the mere execution, after he attains his age, of another conveyance, even to a purchaser for value; and the learned judge who wrote the opinion stated that it had been determined, by authority, "that a deed of bargain and sale made by an infant is not avoided by his execution and delivery to a third person of a similar conveyance after he has attained his age; but that, to enable him to pass the title by a second conveyance, his previous actual entry upon the lands is an indispensable requisite, and that this rule is applicable in all cases except where the infant has retained possession of the lands, or at the time of the execution of the second deed, they are wholly vacant." (*Dominick v. Michael*, 4 *Sandf. R.* 421.) And in a later case, in the supreme court of the State of New York, it was held, at special term, that the conveyance of an infant can be avoided by him at any time within twenty years after he comes of age; but that he can avoid it only by entry upon the land, or executing a conveyance of it to a third person, or by demanding possession or giving notice of his intention not to be bound by the conveyance; and that he cannot maintain an action brought before he has so avoided it, and the act of avoidance must be stated in the complaint. (*Voorhees v. Voorhees*, 24 *Barb. R.* 150.) This is certainly a very proper rule, for it is due to a party in possession of lands under

the conveyance of an infant, that he should not be put to the expense of an action of ejectment before he has notice, at least, that the grantor designs to disaffirm his conveyance. It was held, in a still later case in the same court, at general term, that, where an infant had executed a mortgage upon his lands, and after he had attained full age, executed a deed for the same lands to a third person, without referring to the mortgage, that the execution of the deed did not amount to a repudiation of the mortgage; and further, that when the contrary is not expressed, the intent of the deed will be deemed to be that the grantor shall take subject to any prior mortgage. (*Palmer v. Miller*, 25 *Barb. R.* 399.)

§ 34. In the supreme judicial court of Massachusetts, it was held, that an assignment by an infant of a note not negotiable, may be avoided by him, by giving notice to the assignee that he considers the bargain void, and offering to return the consideration received. (*Willis v. Twambly*, 13 *Mass. R.* 204.)

In the State of South Carolina, it has been judicially determined, that an infant, on arriving at full age, may in various ways disavow his intention to carry into effect a contract made during his minority; that he may do so by entering on lands which he has sold; or by reconveying them to another; or by leaving the service of one to whom he was bound, and entering that of another. (*McGill v. Woodward*, *Const. R.* 468.) In the State of Alabama it has been decided that if a minor sells the same property twice, and after coming of age ratify the second sale, this is a disaffirmance of the first sale and precludes him from ratifying that sale. (*Derrick v. Kennedy*, 4 *Porter's R.* 41.)

In another case in the State of Massachusetts, it was held that when an infant makes a conveyance of land by deed, the title will remain good to the grantee, until the grantor shall lawfully disaffirm the deed; which he can do only by entry; but, having entered, that his subsequent deed, accompanied by proof of facts tending to avoid the first, will convey the title to another. (*Worcester v. Eaton*, 13 *Mass. R.* 371, 375.)

In the supreme court of the State of Illinois, it was held that an infant's contract to sell land cannot be enforced, if the infant refuse to sanction the transaction when of age. There the mere refusal to recognize the contract as of binding force was a disaffirmance. (*Walker v. Ellis* 12 *Ill. R.* 470.)

In the State of Virginia it has been held that an infant's bond for the conveyance of his land, is avoided by a sale of the same land to a third person after becoming of age. (*Mustard v. Wohlford*, 15 *Gratt. R.* 324.)

From the authorities cited, it will not be difficult to determine the manner in which any voidable act of an infant may be disaffirmed and effectually avoided.

§ 35. The consequences or effects of the disaffirmance of the acts of infants are different, according as the contract is executory on both sides, or executed on one side, and executory on the other; or executed on both sides. When the contract is executory on both sides, and it is disaffirmed by the infant, the disaffirmance releases the adult from his part of the obligation. This places both parties in *statu quo*—in the exact condition they occupied before the contract was entered into. There is never any difficulty in such a case; but when the contract has been performed on one side, and remains executory on the other, the law is not so simple, and it is not so easy always to determine the *status* of the parties, on the disaffirmance of the contract by the infant.

If the contract is executory on the part of the adult, on disaffirmance by the infant, the adult will be discharged from the performance of the contract on his part. However, if the infant in such a case has advanced anything to the adult on the contract, he may recover it. (*Corpe v. Overton*, 25 *Eng. C. L. R.* 252. *Millard v. Hewlett*, 19 *Wend. R.* 301.) If the contract be for the purchase of property by the infant, and he perform labor in part payment of the price, and then disaffirm the contract, without having received anything under it, he may recover for work on a *quantum meruit*. (*Medbury v. Watson*, 7 *Hill's R.* 110.) The rule would be different if the infant had received any benefit from his contract, intermediate its date and his disaffirmance; then he cannot recover back the consideration paid. (2 *Kent's Com.* 240. *Kirten v. Elliott*, 2 *Bulstrode's R.* 69. *Harney v. Owen*, 4 *Blackf. [Ind.] R.* 240. *Vide also Aldrich v. Abrahams, Lalor's R.* 423.)

If an infant fail to perform his contract he cannot recover anything under the contract, though if he have paid anything, or performed service under it, he can recover the amount paid, or the actual value of the labor performed, in the *quantum meruit*. (*Howie v. Lincoln*, 25 *Vt. R.* 206.)

If an infant buy a horse and pay a part down and give a mortgage on the horse to recover the balance of the purchase-money, he cannot repudiate the mortgage and keep the horse. (*Heath v. West*, 8 *Foster's* [N. H.] R. 101.)

It seems that a contract beneficial to the infant and fully performed by both parties, cannot be disaffirmed by the infant and enable him to recover for what he has done under it. Thus, an infant, in consideration of an outfit to enable him to go to California, agreed, with the assent of his father, to give the party furnishing the outfit one-third of all the avails of his labor during his absence, which he afterward sent accordingly. The jury having found that the agreement was fairly made, and for a reasonable consideration, and beneficial to the infant, it was held that he could not rescind the agreement and recover back the amount so sent, deducting the amount of the outfit and any other money expended for him by the other party in pursuance of the agreement. (*Breed v. Judd*, 1 *Gray's* [Mass.] R. 455.)

§ 36. When an infant has purchased property and has it in his possession after coming of age, and then would avoid the sale, a different rule prevails than when the infant has wasted or squandered the property during his infancy. In the former case the infant cannot disaffirm the sale and recover the consideration paid, without restoring to the other party the property purchased; and in one case in the supreme court of the State of New York, it was held, that if the infant has, by misuse, injured the property so purchased, so as to essentially lessen its value, the infant cannot recover the consideration paid, at least not without making compensation for the damage. (*Bartholomew v. Finnemore*, 17 *Barb. R.* 428.) The rule was laid down in this latter case that, "if an infant has executed a contract on his part, by the payment of money, or delivery of property, he cannot afterward disaffirm it, and recover back the money, or claim a return of the property, without restoring to the other party the consideration received from him." This doctrine was approved by the superior court of the city of New York, in a later case involving the same question, where the rule was stated: "The terms on which a rescission will be allowed, are a restoration of the property to the defendant, and the payment of such a sum as, with the payments made on account of the purchase, equals the deterioration of the property in value, caused by the plaintiff's use of it." (*Gray v. Lissington*, 2 *Bosw.*

R. 257.) And in another case, in the late court of chancery of the State of New York, where it appeared that the infant had purchased property and executed a mortgage upon it, to secure the purchase-money, and it was held that, after the infant "became of full age, he was at liberty to affirm or disaffirm the mortgage. If he affirmed it, he must pay the amount or deliver the goods, according to its tenor. If he disaffirmed the mortgage, he must restore the goods, or account for their value. He cannot affirm the sale and keep the property, and at the same time repudiate the mortgage." (*Ottman v. Moak*, 3 Sand. Ch. R. 431.) And in another case, in the same court, the chancellor laid down the rule that, "an infant cannot retain property purchased by him, and at the same time repudiate the contract of purchase under which he received the property. And when the infant, after he becomes of age, repudiates the sale, the title to the property remains in the vendor, as between such vendor and the infant." (*Kitchen v. Lee*, 11 Paige's R. 107.) The same doctrine has been enunciated in several cases, both in this country and in England, and the rule may therefore be regarded as settled that, if the infant has the property purchased, or consideration received, and it is capable of specific return, he must restore it to the adverse party, if he disaffirms the sale. (*Vide Badger v. Phinney*, 15 Mass. R. 359. *Roof v. Stafford*, 7 Cow. R. 179. *Farr v. Sumner*, 12 Vt. R. 28. *Taft v. Pike*, 14 ib. 405.)

Chancellor Kent lays down the rule on the subject as follows: "If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword." (2 Kent's Com. 240. *Vide also Strain v. Wright*, 7 Geo. R. 568. *Lock v. Smith*, 41 N. H. R. 346. *Baily v. Barnberger*, 11 B. Mon. R. 113. *Weed v. Beebe*, 21 Vt. R. 495. *Womach v. Womach*, 8 Texas R. 397.)

§ 37. If the infant has parted with the consideration received, or expended the money lent during infancy, it would seem, from authority, that if, on coming of age, he repudiate the contract the adult would be remediless. It is laid down in American Leading Cases by Hare and Wallace as follows: "But if he (the infant)

has, during infancy, wasted, sold or otherwise ceased to possess the property, these acts done in infancy cannot be a conversion, because he then held the goods under an executory transfer of property, which authorized him to use and dispose of them as owner, and a refusal after age to deliver on demand, when he has not the goods, is not a conversion, and trover, therefore, will not lie; and this just and sound distinction is taken in the very clear opinion in *Fitts v. Hall*, 9 *New Hampshire*, 441, 446; and recognized in *Robbins v. Eaton*, 10 *ib.* 562, 565, and *Boody v. McKinney*, 23 *Maine R.* 517, 525, 526; nor can detinue be maintained, for it lies not where the goods, though once in possession, have been parted with in a manner authorized by law. In such case, therefore, he may avoid the contract without being made liable for the consideration in an action sounding in tort." (1 *Am. Leading Cases*, 115.) To repeat, then, the rule would seem to be that, if the contract is executory on both sides, the disaffirmance of the infant releases the adult from his obligation, and thus both parties are placed in *statu quo*.

If the contract has been executed in whole or in part by the infant, but is wholly executory on the part of the adult, the infant, on coming of age, may repudiate the transaction and recover the consideration paid. But if the contract has been executed by the adult, and the infant has the property or consideration received at the time he attains full age, and he then repudiate the transaction, he must return such property or consideration, or its equivalent, to the adult party. If, however, the infant has wasted or squandered the property or consideration received during infancy, and on coming of age repudiates the transaction, the adult party is remediless.

§ 38. If the contract has been fully executed on both sides, and the infant disaffirm the contract and reclaim what he has paid, he must restore the consideration received. This doctrine is well settled by express adjudications and implied in other cases where the question was not directly in point. (*Vide Bigelow v. Kinney*, 3 *Vt. R.* 353, 358. *Price v. Furman*, 1 *Will. [Vt.] R.* 268. *Williams v. Norris*, 2 *Littell's R.* 157, 158. *Hill v. Anderson*, 5 *Sme & Mar. R.* 216. *Grace v. Hale*, 2 *Humphrey's R.* 27. *Smith v. Evans*, 5 *ib.* 70. *Badger v. Phinney*, 15 *Mass. R.* 359. *Edgerton v. Wolf*, 6 *Gray's [Mass.] R.* 453.

If the infant commence an action on coming of age, to set aside a conveyance of real estate executed during infancy, he must offer

to restore the purchase-money if he has received it. (*Hilleyer v. Bennett*, 3 *Edw. Ch. R.* 222.) "The only reason why the rescission of a contract in any case gives a right to recover what has passed by the contract is, that the consideration of such transfer has totally failed; and, unless the party is restored to the situation which he was in before, the consideration has not wholly failed as to him; in other words, there can be no avoidance by parol so as to give a right to recover back property once lawfully transferred and vested, so long as any part of the consideration is withheld." (1 *Am. Lead. Cas.* 116.) For the same principle, reference may be made to the following cases, which are cited in the volume above referred to: (*Dulty v. Brownfield*, 1 *Barr's R.* 497. *Willis v. Twambly*, 13 *Mass. R.* 204, 206. *Nightingale v. Withington*, 15 *ib.* 272, 274. *Price v. Freeman*, 1 *Williams' [Vt.] R.* 268.)

§ 39. It has been held by the supreme court of the State of New York, however, that in an action by an infant to recover for work and labor, it is neither a defense nor a ground for reducing the amount of the recovery, that the work was done under a contract by the infant to labor for the defendant for a fixed period of time, which he violated by leaving the defendant's employ without cause before the time had expired. (*Whitmarsh v. Hall*, 3 *Denio's R.* 375.) On the contrary, it was adjudicated in one case in the supreme judicial court of Massachusetts, where it appeared that the plaintiff, an infant, had made a special agreement to labor for the defendant a certain time for certain wages, and, before the time expired, left his service voluntarily without cause, that the infant might recover on a *quantum meruit* for the services performed, and if his employer was injured by the sudden termination of the contract without notice, a deduction should be made on that account. (*Moses v. Stevens*, 2 *Pick. R.* 332.) The learned judge, in delivering the opinion of the court, said: "We think the special contract being avoided, an *indebitatus assumpsit* upon a *quantum meruit* lies, as it would if no contract had been made; and no injustice will be done, because the jury will give no more than, under all circumstances, the services were worth, making any allowance for any disappointment amounting to an injury which the defendant in such case would sustain by the avoiding of the contract." In regard to this doctrine, the learned judge who delivered the opinion in the case of *Whitmarsh v. Hall*, *supra*, says: "With great respect, I am unable to yield my assent to the sound

ness of the qualification annexed to the proposition. I think that the infant plaintiff in such action is entitled, by well settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. A recovery is allowed upon the assumption that there is no express contract at all."

This latter is undoubtedly the true rule, for if it were otherwise there would be no more risk in dealing with an infant than with an adult, and the infant would be deprived of the protection which the law gives to shield him from the imposition to which he is exposed.

CHAPTER VI.

OF THE CONFIRMATION OF THE VOIDABLE ACTS OF AN INFANT—HOW THE SAME ARE RATIFIED—WHAT IS A SUFFICIENT RATIFICATION.

§ 40. WHAT facts and circumstances will give binding force to the voidable acts and contracts of an infant depends very much upon the nature of the act to be ratified or confirmed. Words and acts which operate as a ratification of an executed contract may fall very far short of a confirmation of one that is wholly executory on the part of the infant.

Bingham lays down the rule that when the act of an infant is apparently for his advantage, a very slight admission, after he comes of age, will inure as a confirmation of such act; and the reason given is that the privileges attached to infancy, being intended as a general protection or shield, shall not operate as a weapon enabling individuals capriciously to attack the interest of others, or procure to themselves unfair advantages. (*Bing. on Inf.* 64.) This rule will answer in all cases of purchases of infants, and their executed contracts, for in those cases any explicit acknowledgment of liability or continuing in possession of the property purchased after attaining majority, using it as his own, selling or mortgaging it, or exercising any unequivocal act of ownership over it, and giving no notice to the other party of an intention to disaffirm the contract or purchase, will be a binding ratification of the purchase or contract. But in order to ratify an executory contract the better authority is that there must be not only an acknowledg-

ment of liability, but generally an express promise to perform it, made voluntarily and understandingly after the infant has become of full age.

In one case, however, in the English courts, two of the judges took a distinction between the *ratification* of a contract and a mere promise, holding that "a ratification means such a ratification as would make a person liable as principal for an act done by a third person in his name;" and Parke, B., said: "I take the meaning of ratification to be different from a promise. It is an admission that he is liable and bound to pay that debt on a contract which he made when an infant." (*Mawson v. Blane*, 26 *Eng. L. & Eq. R.* 560, 561.)

The authorities, and especially the later authorities, make a decided distinction between the acts and words necessary to confirm an executory contract and those necessary to ratify an executed contract or sale.

§ 41. In regard to the ratification of an executed contract or purchase by an infant, it has been held in one case, when an infant took the note of a third person in payment for work done, and retained the same for eight months after he came of age, and then offered to return it and demanded payment for his work, that the retaining of the note for such a length of time was a ratification of the contract made during infancy, especially when in the mean time the maker of the note had become insolvent, the debt lost, and the offer to return the note made on the heel of that event. (*Delano v. Blake*, 11 *Wend. R.* 85.) The infant being the actor, instead of being on the defensive, the court held that he was bound to show a disaffirmance of the contract by returning the note before he could call upon the defendant for payment for the work done, in ratification of which the note was received during infancy. In another case an infant submitted a claim to arbitration, and on an award being made in his favor and paid to his guardian, he received the money from his guardian after he attained his full age, the court held the acts of the infant affirmed the submission and barred his claim. (*Jones v. The Phoenix Bank*, 8 *N. Y. R.* 228.)

Story lays down the rule as extracted from the authorities, that, whenever the infant continues, after coming of full age, to occupy a position which is only explicable upon the supposition that he intends to stand by his contract, it will be considered as a ratifica-

tion of an executed contract. He is, however, allowed a reasonable time after he comes of age, *locus penitentiae*, during which he may disaffirm his contract, and during which a mere acquiescence, without any unequivocal acts, establishing a clear intention to confirm his contract, will not operate as a confirmation. (*Story on Con.* § 72, referring to *Tucker v. Moreland*, 10 *Peters*, R. 75, 76. *Jackson v. Carpenter*, 11 *Johns. R.* 542. *Holmes v. Blogg*, 2 *Moore's R.* 552.)

All of the authorities agree that in cases of purchases by infants and their executed contracts, much less is required for their ratification than in cases of their conveyances or their executory contracts, and that, in all cases of the former, slight acts and circumstances will be sufficient to operate as a confirmation of the transaction. (*Vide* *Boody v. McKinney*, 23 *Maine R.* 517. *Robbins v. Eaton*, 10 *N. H. R.* 561. *Kline v. Beebe*, 6 *Conn. R.* 494. *Phillips v. Green*, 5 *Monroe's [Ky.] R.* 344. *Bigelow v. Kinney*, 3 *Vt. R.* 353. *Belten v. Briggs*, 4 *Dess. [S. C.] R.* 465. *Deason v. Boyd*, 1 *Dana's [Ky.] R.* 45. *Alexander v. Heriot*, 1 *Bailey's Eq. R.* 223. *Eubanks v. Peak*, 2 *Bailey's [S. C.] R.* 469. *Barnaby v. Barnaby*, 1 *Pick. R.* 221.)

§ 42. When an infant makes a conditional purchase of personal property, with the right to return it if he is not pleased with it, should he retain it an unreasonable length of time after coming of age, he would be considered as assenting to the purchase, and it would thereby become absolute. Thus, an infant bought a chattel subject to the right of returning it if he did not like it. He kept the property for at least two months after he was of age, and after he had been requested by the vendor to return it if he did not like it; the court held it a confirmation of the purchase. (*Aldrich v. Grimes*, 10 *N. H. R.* 194.) So where an infant purchased a horse, and gave his note for the purchase-money, and kept the horse until after he was of age, and then sold him, this was regarded as a ratification of the purchase, and the infant was held liable on his note. (*Christian v. Bennett*, 4 *McCord's [S. C.] R.* 241.) So if an infant buy goods on credit, and has them in his possession and uses them, and does not return them to the vendor within a reasonable time after he comes of age, it has been held that he thereby ratifies the purchase, and becomes liable for the price of the goods. (*Boyden v. Boyden*, 9 *Metc. R.* 519.) So in another case, where an infant purchased a yoke of oxen, for which he gave his negotiable promissory note; after he became of age, he disposed of the

oxen and received the avails; this was held a ratification of the purchase, and the infant was made liable to pay his note. (*Lawson v. Lovejoy*, 8 *Greenl. R.* 405.)

§ 43. With respect to an infant's purchases of real estate, they may be ratified by the same acts and words as those of personal chattels, when the circumstances are similar in the two cases. In all these cases, an actual and complete appropriation of the property acquired during infancy, after the infant attains to adult age, confirms the purchase. It has been repeatedly adjudicated by the courts, both in this country and in England, that the purchase of land by an infant vests the freehold in him until he disagrees to it; and in some cases it has been held that his continuing in possession after full age, is an actual confirmation of the purchase. (2 *Vent. R.* 203, and *vide Co. Litt.* 2 *b.*) But this doctrine should probably be received with the qualification given by Story, referred to in section 41. So it is said, that if an infant make an exchange of lands, and continue in possession after age, he shall be bound by his bargain. (2 *Vent. R.* 225. *Co. Litt.* 51 *a.*) So where an infant takes a lease for years, renders rent which is in arrears for several years, and after age continues the occupation of the land; it has been held that this makes the lease binding, and, by consequence, the lessor is chargeable with all the arrears incurred during his minority; for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears which the lessor suffered to incur during his minority, yet his continuance in possession after full age ratifies and affirms the contract *ab initio*, and so gives remedy for the arrears of rent incurred from the time of the contract made. (*Bing. on Inf.* 66, and cases cited. *Vide also* 20 *Am. Jur. p.* 273, note 4, and *p.* 278.)

There are several American authorities holding the doctrine that a purchase or hiring of land, or a reservation of rent, is actually confirmed by retaining possession of the land an unreasonable length of time, or receiving the rent after age, or by selling the land after age to a stranger. (*Boody v. McKinney*, 23 *Me. R.* 517, 524. *Bigelow v. Kinney*, 3 *Vt. R.* 353, 359. *Robbins v. Eaton*, 10 *N. H. R.* 562, 566.)

If an infant lease his property, and, on coming of age, mortgage the same to the lessee, and in the mortgage deed refer to the lease, this has been held a ratification of the lease. (*Story v. Johnson*, 2 *You. & Coll. R.* 586.) So if an infant make a mortgage of his

land, and, after full age, convey the same land subject to the mortgage, the effect will be the same; the second deed will be held to confirm and make good the mortgage. (*Boston Bank v. Chamberlain*, 15 *Mass. R.* 220.) And where an infant purchased land, and, upon the execution and delivery of the deed, gave a bond and mortgage upon the premises for the purchase-money, and both the deed and mortgage were duly acknowledged and recorded, and one-half of the purchase-money was paid at the time of the purchase, the infant went into immediate possession of the premises, and continued in possession until after he was of age, and then sold the premises to third persons; this was held as a ratification of the mortgage, and the mortgage was declared to be a legal charge upon the land, and the infant liable on his bond for any deficiency after a sale of the premises. The court held that the infant, on coming of age, might have relinquished the property, and claimed a repayment of the money paid by him to the grantor at the time of the purchase. "But by continuing in possession after twenty-one, and conveying the land with warranty, he affirmed the contract and made himself liable for the payment of the residue of the purchase-money." (*Lynde v. Rudd*, 2 *Paige's R.* 191.) To the same import are many other American cases, modified in some instances by the fact that the mortgage was subsequent to the deed and a distinct transaction. (*Vide Hubbard v. Cummings*, 1 *Greenl. R.* 11. *Dana v. Coombs*, 6 *ib.* 89. *Robbins v. Eaton*, 10 *N. H. R.* 562. *Bigelow v. Kinney*, 3 *Vt. R.* 353. *Richardson v. Boring*, 9 *ib.* 368.)

§ 44. The conveyances of an infant are not so easily ratified as his purchases or exchanges. In these cases no bare recognition or silent acquiescence will be regarded as a confirmation of the sale, unless prolonged for the statutory limitation. Neither will slight or vague declarations of the grantor, after he becomes of age, amount to a ratification of the grant. This doctrine is now well settled by the current of authorities upon the subject. A deed of confirmation is not necessary, but there must be some positive act or words of the minor, from which his assent of the deed executed during his minority may be inferred. (2 *Kent's Com.* 238, note a. *Wheaton v. East*, 5 *Yerger's [Tenn.] R.* 41.) In the English courts the rule has been laid down in these cases that an act of as high a solemnity as the original act is necessary to a confirmation.

Lord Ellenborough is reported to have said: "We cannot surrender the interests of the infant into such hands as he may chance to

get. It appears to me that we should be doing so in this case (that of a deed), unless we required the act after full age to be of as great a solemnity as the original instrument." (*Baylis v. Dineley*, 3 *Maule & Selw. R.* 482.)

In regard to this opinion of Lord Ellenborough, Mr. Justice Story remarks: "Without undertaking to apply this doctrine to its fullest extent, and admitting that acts *in pais* may amount to a confirmation of a deed, still we are of the opinion that these acts should be of such a solemn and unequivocal nature as to establish a clear intention to confirm the deed, after a full knowledge that it was voidable. *A fortiori*, mere acquiescence, uncoupled with any acts demonstrative of an attempt to confirm it, would be insufficient for the purpose." (*Tucker v. Moreland*, 10 *Peter's R.* 75, 76.)

In a case in the supreme court of the State of New York, it was held that an acquiescence by the grantor in a conveyance made during his infancy, for eleven years after he came of age, did not amount to a confirmation of the conveyance; that some positive act was necessary evincing his assent to the conveyance. (*Jackson v. Carpenter*, 11 *Johns. R.* 542, 543.) And in the supreme court of the State of Pennsylvania it was held that to constitute a confirmation of a conveyance or contract by an infant, after he arrives of age, there must be some distinct act by which he receives a benefit from the contract after he arrives at age, or does some act of express ratification. (*Austin v. Patton*, 11 *Serg. & Rawle's R.* 311.) With respect to these two latter cases, Justice Story says: "There is much good sense in these decisions, and they are indispensable to a just support of the rights of infants according to the common law." (*Tucker v. Moreland*, *supra*. *Vide also Ordinary v. Wherry*, 1 *Bai. [S. C.] R.* 28.) And in a late case in Pennsylvania it was held that fourteen years' delay to repudiate a sale of real estate by an infant after he attained his majority was not an affirmance. (*Urban v. Groines*, 2 *Grant's R.* 96.)

§ 45. In a case in the late court of chancery of the State of New York, it appeared that an infant conveyed land to another, and the latter conveyed the same land still to another; and after the infant had attained his majority he executed a release to the last grantee. This was held and taken to be an affirmance of the first deed. (*Eagle Fire Company v. Lent*, 1 *Edw. Ch. R.* 301. *S. C.* 6 *Paige's R.* 635.) In another case in the same court, it appeared that an infant bor-

rowed money and executed a mortgage of land to secure the payment, and died shortly after attaining full age, leaving a will by which he directed all of his just debts to be paid. It was held that the will, under all the circumstances, confirmed the mortgage deed. The vice-chancellor remarked, that the facts and circumstances under which the loan was obtained, would justify the court in laying hold of any equitable construction which could properly be given to the will, and to hold it to be a confirmation, instead of an avoidance of the bond and mortgage. (*Merchants' Fire Ins. Co. v. Grant*, 2 *Edw. Ch. R.* 544.)

In a case, however, in the supreme judicial court of Massachusetts, a different doctrine is laid down; and it may well be doubted whether a clause in a will simply directing the payment of all just debts, can be regarded as a confirmation of a particular mortgage, executed by the testator while an infant. (*Smith v. Mayo*, 9 *Mass. R.* 62.) In the State of North Carolina, it has been held that a verbal confirmation of a deed, after the infant arrives of age, is sufficient. (1 *Hayward's R.* 143.) The same court however held, in another case, upon a full consideration of the subject, that to ratify an infant's bargain and sale, after full age, some act must be done denoting that the estate created by the deed was subsisting, as the receipt of the purchase-money, or the like. (2 *Kent's Com.* 239, note b, citing *Hoyle v. Stowe*, 2 *Dev. & Bat. R.* 320.) An infant may confirm his deed, by a recital in another deed when of full age, provided there is in the recital an express design to confirm the former deed. (*Phillips v. Green*, 5 *Monroe's R.* 344, 355.)

In the court of chancery of the State of New Jersey, it was held that when an infant exchanged lands with another, and deeds of conveyance were interchanged, and the infant sold the land received in exchange, the sale was a ratification of the transaction. (*Williams v. Mabee*, 3 *Halst. Ch. R.* 500.)

§ 46. The promises of an infant for the future payment of money, and all his executory contracts which are voidable, can be ratified only by a new promise to pay, or such express acts as will be equivalent to a new contract. The most that can be said of the original contract made during infancy, is that it is a valid consideration, and will afford aliment upon which to predicate a binding undertaking of the minor after he attains to full age. The original contract not being binding on the infant, the new promise must possess all the ingredients of a complete agreement. Any-

thing short of this will fail to make the infant liable on the demand. So stringent is this doctrine, that a full acknowledgment or promise to pay a part, or even actual payment of a part, will not render the infant liable to pay the whole debt. This view is sustained by all the most approved authorities of the present day. As no agreement is complete until the minds of the parties meet, it follows that the new promise, to be binding on the infant, must be made to the creditor in person, or to his agent. The new promise of the infant must be voluntary, free, and with full knowledge, that otherwise he would not be liable, and of course the promise must be made before the commencement of the suit to recover the demand.

The promise to pay or perform by the infant after coming of age, need not be made personally to the creditor or obligor; but if made to an agent of such creditor or obligor, it will be sufficient, and the promise will be binding. (*Mayor v. McLure*, 36 *Miss. R.* 389.) But the ratification must be by some positive act or promise. (*Boody v. McKinney*, 23 *Maine R.* 517.)

Story states the rule: "In order to ratify an executory agreement made during infancy, there must be not only an acknowledgment of liability, but an express promise, voluntarily and deliberately made by the infant upon his arriving at the age of maturity, and with the knowledge that he is not legally liable." (*Story on Con.* § 69.) This doctrine is abundantly sustained by authority. (*Vide Goodsell v. Myers*, 3 *Wend. R.* 479. *Rogers v. Hurd*, 4 *Day's R.* 57. *Wilcox v. Roath*, 12 *Conn. R.* 550. *Hale v. Gerrish*, 8 *N. H. R.* 374. *Bigelow v. Grannis*, 2 *Hill's [N. Y.] R.* 120. *Millard v. Hewlett*, 19 *Wend. R.* 301. *Watkins v. Stevens*, 4 *Barb. R.* 175. *Hodges v. Hunt*, 22 *ib.* 151. *Gay v. Ballou*, 4 *Wend. R.* 405. *Ford v. Phillips*, 1 *Pick. R.* 202. *Thompson v. Lay*, 4 *ib.* 49. *Hubbard v. Cummings*, 1 *Greenl. R.* 11. *Thrupp v. Fielder*, 2 *Esp. R.* 628. *Harmer v. Killing*, 5 *ib.* 102. *Whitney v. Dutch*, 14 *Mass. R.* 460. *Smith v. Mayo*, 9 *ib.* 62. *Jackson v. Carpenter*, 11 *Johns. R.* 537. *Deason v. Boyd*, 1 *Dana's R.* 45. *Tucker v. Moreland*, 10 *Peters' R.* 73. *Hoit v. Underhill*, 10 *N. H. R.* 220. *Merriam v. Wilkins*, 6 *ib.* 432. *Thornton v. Illingworth*, 9 *Eng. C. L. R.* 256. *Wing v. Libby*, 16 *Maine R.* 55. *Curtin v. Patton*, 11 *Serg. & Rawle's R.* 307. *Brock v. Galby*, 2 *Atk. R.* 34. *Hineley v. Margaritz*, 3 *Barr's R.* 428.)

§ 47. But it will be convenient to refer to some of the express adjudications upon this branch of the subject. When the action

was upon a promissory note in the supreme court of the State of New York, the learned judge, in giving the opinion, said: "A ratification of an infant's contract should be something more than a mere admission to a stranger that such a contract existed; there should be a promise to a party in interest or his agent, or at least an explicit admission of an existing liability from which a promise may be implied." (*Goodsell v. Myers*, 3 *Wend. R.* 482.) In another case in the same court, which was also an action upon a promissory note, the learned judge said: "In the case of infancy there must be a new *promise* or ratification of the contract after the defendant has attained the age of twenty-one years; and, as in other cases of contract, the minds of the parties must meet. A promise to a stranger will not answer. It must be to the plaintiff, or, what is the same thing, to his attorney or agent." (*Bigelow v. Grannis*, 2 *Hill's R.* 120.) So also in a still later case in the same court, which was also an action upon a promissory note, it was held that, inasmuch as the infant's contract was not binding, the new promise made by the infant after he became of full age must possess all the ingredients of a complete agreement to enable the creditor to recover. It was said by the learned judge, in giving the opinion of the court, that the new promise of the infant did not impart to the contract made during infancy any legal validity so as to enable the creditor to enforce it; "but the new promise creates a new contract founded upon and deriving its aliment from the old demand, upon which the creditor may sustain a suit against the infant." (*Hodges v. Hunt*, 22 *Barb. R.* 151. *Vide also Taft v. Sergeant*, 18 *ib.* 320.)

§ 48. In an action in the supreme judicial court of the State of Massachusetts, which was upon a promissory note made by a minor, it appeared that after the maker attained to the age of maturity he made his last will, which was duly proven, in which he devised all his estate, both real and personal, to certain of his brothers and sisters, adding this clause: "*after my just debts shall be paid, which I direct first to be done.*" This was held not a confirmation of the note; and the learned judge, in giving the opinion of the court, said: "The action is attempted to be supported solely on the ground that the will, which was made after the testator attained to full age, contains a direction to pay his just debts; and it may be presumed, although it is not stated, that the note declared on was given for a just debt. The only case analogous to this is in

chancery, where, it appearing by the will that the infant devised his personal estate for the payment of his debts, particularly those he had set his hand to, it was decreed that a bond debt, contracted while he was an infant, should be paid. But at common law it has been settled, in a great variety of cases, that a direct promise when of age is necessary to establish a contract made during minority, and that a mere acknowledgment, as in cases under the statute of limitations, will not have that effect; and it has further been decided that such promise must be made deliberately, and *with a knowledge that the party is not liable by law*. We cannot consider the expression in this will as amounting to such a promise." (*Smith v. Mayo*, 9 *Mass. R.* 62.)

In a later case in the same court, in which the opinion was delivered by the same learned judge as in the last case cited, it appeared that an infant made his promissory note, and, when of age, being applied to for payment, acknowledged that the money was due, and promised that on his return to his home he would endeavor to procure it and send it to the creditor. This was holden to be a sufficient ratification of the original promise. The judge said that "the terms of ratification need not be such as to import a direct promise to pay. All that is necessary is that he expressly agreed to ratify his contract, not by doubtful acts, such as payment of a part of the money due or the interest, but by words, oral or in writing, which import a recognition and confirmation of his promise." (*Whitney v. Dutch*, 14 *Mass. R.* 457.) The disposition of this case was undoubtedly correct, but the theory of the judge is somewhat different from the position taken in the case of *Hodges v. Hunt*, before referred to. In that case the judge held that the action must be upon the *new* contract, and he took exception to the language of the judge in another similar case, saying that the judge "was not critically correct when he said that the note of the infant in that case stood revived and ratified by the new promise." And in a late case in the supreme judicial court of Massachusetts, Chief Justice Shaw said: "It seems to be established in Massachusetts that the note of an infant is voidable only, and may be regarded as a good foundation for a new promise when he comes of age." (*Rud v. Batchelder*, 1 *Metc. R.* 559.)

In another case in the same court, being an action upon a promissory note of an infant, it appeared that when the sheriff went to serve the writ, the defendant, then of age, said, "that he owed

the plaintiff, but was unable to pay him; he would endeavor, however, to get his brother to be bound with him," and this was held insufficient to renew the promise. The judge said: "A direct promise is necessary; a mere acknowledgment of the debt is not sufficient. It must be voluntary; not under the terror of an arrest, and with a knowledge that the party was by law discharged. Paying money on account of a bill is not sufficient. The promise is not to be inferred, as in the cases under the statute of limitations, but express, and it must be made before the commencement of the action." (*Ford v. Phillips*, 1 *Pick. R.* 202.)

And in still another case in the same court, the doctrine was expressly enunciated, that to sustain an action against a person of full age, on a promise made by him when an infant, there must be an express ratification; as by saying, "I ratify and confirm," or, "I agree to pay the debt." (*Thompson v. Lay*, 4 *Pick. R.* 48.) It was also declared in the last case, that the promise might be conditional, and nevertheless binding; but that if the evidence of ratification is of a promise to pay "when the defendant shall be able," the plaintiff must prove the defendant's ability; though it need not be proved that he could pay without inconvenience. In Vermont, it has been held that an infant's contract to labor is ratified by the infant's continuing to labor under it one month after his majority. (*Forsyth v. Hastings*, 1 *Will. [Vt.] R.* 646.)

§ 49. The following points upon this subject have been settled by express adjudication, in cases, the most of which are referred to in the notes and references by E. H. Bennett, Esq., accompanying the text of Bingham's work on Infancy and Coverture. (*Bing. on Inf.* 68, note 6.) The words, "I have not the money now, but when I return from my voyage I will settle with you;" and, "I owe you, and will pay you when I return," have been held a sufficient ratification. (*Martin v. Mayo*, 10 *Mass. R.* 137.) These words have also been held a confirmation of an infant's agreement, "I will pay it (the note) as soon as I can make it, but not this year, I understand the holder is about to sue it, but she had better not." (*Bobo v. Hansell*, 2 *Bailey's [S. C.], R.* 114.) Of course, this language must have been addressed to the holder of the note, or her agent or attorney, or it would not have been binding.

When a minor after coming of age wrote to the plaintiff, "I am sorry to give you so much trouble in calling, but I am not prepared for you, but will without neglect remit you in a short time;" this

was held a sufficient ratification. (*Hartley v. Wharton*, 39 *Eng. C. L. R.* 276.) So in another case in the English court, it is said, that any written instrument signed by the infant, which in the case of adults would have amounted to the adoption of the act of the party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. (*Harris v. Wall*, 1 *Wels., Hurl. & Gordon's R.* 128.) A declaration of an intention to pay a note, and authorizing an agent to take it up, has been held a good ratification, although the agent had done nothing about it. (*Orvis v. Kimball*, 3 *N. H. R.* 314.)

On the other hand, an admission by an infant, that he owed the debt, and that the adult *would get his pay*, but at the same time refusing to give his note, was considered no ratification of the original promise. (*Hale v. Gerrish*, 8 *N. H. R.* 374.)

So a letter to the holder of a bill of exchange accepted by an infant, written after he becomes of age, "your brother tells me you are very uneasy about the £500 bill drawn by Mr. Pattinger on me. Please make yourself easy about it, as I will take care that it is paid, and Sir Henry Pattinger comes to England in June," was held by two judges against two, not to be a sufficient ratification of the promise. (*Mawson v. Blane*, 26 *Eng. L. & Eq. R.* 560, 561.)

So, likewise, the language, "I consider your claim as worthy my attention, but not my first attention," adding that he would soon give it the attention due, was held insufficient. (*Wilcox v. Roath*, 12 *Conn. R.* 550.) So also it was held by the same court, that a submission to arbitration, whether the maker was liable or not, on his promissory note made during infancy, was no ratification of the note. (*Benham v. Bishop*, 9 *Conn. R.* 330.) So in England it has been held that when an infant subscribed to the capital stock of an incorporated company, the retention of the shares after majority would render him liable for calls. (*Cork v. Cazenove*, 59 *Eng. C. L. R.* 934.)

And in this country, when an infant maker of a promissory note, after he became of age, said to the payee that he had a good crop of corn, and if he would take corn on the note, he would deliver it to him as soon as it was threshed, the price per bushel being fixed, but nothing said as to the quantity, it was held that this was a sufficient affirmance of the note. (*Stokes v. Brown*, 4 *Chand. [Wis.] R.* 39.)

In another case, an infant after full age admitted the justice of the note given during his infancy, and gave the payee a watch in part payment, this was held a confirmation of the note. (*Little v. Duncan*, 9 *Rich. [S. C.] Law R.* 55.)

And it has been held by the New York court of appeals, that when a minor submitted a claim to arbitration, and on an award being made in his favor and paid to his guardian, he received the money after he attained his full age, the receiving of the money was an affirmance of the submission and barred the claim. (*Jones v. Phoenix Bank*, 8 *N. Y. R.* 228.)

A promise by a minor to pay money, borrowed on joint account with another person may be ratified by the minor after coming of age, like other voidable promises. (*Kenedy v. Doyle*, 10 *Allen's R.* 161.)

§ 50. Bingham states, upon authority, that a promise after age will ratify a bare security for a third person, given by the infant. (*Bing. on Inf.* 69.) In such case, however, the English courts have held that if the original transaction was not perfectly fair, and the party was entrapped into a ratification, immediately on coming of age, equity will give relief. (*Brock v. Galby*, 2 *Atk. R.* 34.)

It has been held in the American courts that, in these cases of infant's security for third persons, there must be a distinct act of confirmation. (*Curtin v. Patten*, 11 *Serg. & Rawle's R.* 309. *Hinely v. Margaritz*, 3 *Barr's R.* 428.) And it has been held in Connecticut, Virginia and Tennessee, that such contracts of infants are absolutely void, and therefore not susceptible of ratification. (*Maples v. Wightman*, 4 *Conn. R.* 376. *Allen v. Minor*, 2 *Call's [Va.] R.* 70. *Wheaton v. East*, 5 *Yerger's [Tenn.] R.* 41, 61.) The better opinion, however, as extracted from later authorities, is, that these contracts of infants are not absolutely void, but may be ratified after the infant attains to the age of majority. (1 *Parsons on Contracts*, 244.)

§ 51. It has been held in the English courts, where an infant desired that lands subject to a trust for payment of younger children's portions, might not be sold, and offered, by his answer in chancery, to settle other lands for raising the portions; that he should be bound by the offer made by him in his answer, if the other side were thereby delayed, and if the infant did not, immediately after his coming of age, apply to the court in order to

retract his offer, and amend his answer. (*Cecil v. Salisbury*, 2 *Vernon's Ch. R.* 224.) This was a very reasonable rule in a given case, and in a similar case in this country the court would probably make a similar ruling. Certainly, the authority would be recognized here, as the adjudication of a very distinguished court. The acts of an infant which are only voidable *sub modo*, as fines, common recoveries and recognizances, to which reference is made in a previous chapter, will be considered as confirmed, if not avoided, in the time and manner prescribed by law. (*Vide ante*, § 25.)

In one case in England it was held that if an infant deliver a deed within age, and after age deliver it again, this second delivery is void, for the reason that the deed, taking effect as to some intents from the first delivery, cannot be allowed to take any from the second, and so have a double operation. (*Butler & Baker's case*, 3 *Coke's R.* 35 *b.*) It is suggested, however, that the reason assigned for the position of the court in this case is little less than a fiction, and *probably* the second delivery of the deed, if made deliberately and understandingly, would now be regarded as a confirmation of the conveyance.

In a recent case in the supreme court of the State of New York, the execution and delivery of a mortgage of real estate by an infant, and an acknowledgment and redelivery of the same after the infant became of age, was held a ratification of the instrument, and that the subsequent acknowledgment related back in its effect to the original delivery, and affected all intermediate sales, except for a new and valuable consideration. (*Palmer v. Miller*, 25 *Barb. R.* 399.)

§ 52. In one case in the supreme court of the State of Connecticut, the subject of the confirmation of the acts of infants was very fully discussed and considered, and it was held that there were three modes of affirming the voidable contracts of infants when they arrived at full age: first, by express ratification; second, by acts which reasonably imply an affirmance; third, by the omission to disaffirm within a reasonable time. (2 *Kent's Com.* 239, note *a.* *Kline v. Beebe*, 6 *Conn. R.* 494.)

And in the supreme court of the State of Maine the question of the affirmance of contracts by infants has been thoroughly examined, and Shepley, J., in delivering the opinion of the court, classified the subject-matter of the infant's contract as follows:

"1. When he has made a conveyance of real estate during his infancy, and would affirm or disaffirm after he becomes of age. In such case the mere acquiescence for years to disaffirm it affords no proof of ratification. There must be some positive and clear act performed for that purpose. The reason is that by his silent acquiescence he occasions no injury to other persons, and secures no benefits or new rights to himself. There is nothing to urge him as a duty toward others to act speedily. Language, appropriate in other cases, requiring him to act within a reasonable time, would become inappropriate here. He may, therefore, after years of acquiescence, by an entry or by a conveyance of the estate to another person, disaffirm and avoid the conveyance made during his infancy.

"2. When, during infancy, he has purchased real estate or has taken a lease of it subject to the payment of a rent, or has granted a lease of it upon payment of rent. In such cases it is obvious, when he becomes of age, that he is under a necessity, or that common justice imposes it upon him as a duty, to make his election within a reasonable time. He cannot enjoy the estate after he becomes of age for years and then disaffirm the purchase and refuse to pay for it, or claim the consideration paid, or thus enjoy the leased estate and then avoid payment of the stipulated rent, or receive rent on the lease granted and then disaffirm the lease. When he will receive a benefit by silent acquiescence he must make his election within a reasonable time after he arrives at full age, or the benefit so received will be satisfactory proof of a ratification. In the case of *Benham v. Bishop*, 9 Conn. R. 330, it appeared that the defendant and his mother and sisters were in possession and owned land in common, and that defendant, while an infant, made his note to another sister for a conveyance to him of her undivided share of the same estate, and that they continued to occupy the land in the same manner several years after he became of age; and it was decided not to amount to a ratification of the note. This case can only be regarded as correctly decided by considering the defendant as having occupied only by virtue of his own previous title as a tenant in common.

"3. When he has, during infancy, sold and delivered personal property. When the contract was executed by his receiving payment, it is obvious that he can receive no benefit by acquiescence; and it alone does not confirm the contract. When the

contract remains unexecuted, and he holds a bill or note taken in payment for the property, if he should collect or receive the money due upon it, or any part of it, that would affirm the contract. Should he disaffirm the contract and reclaim the property, the bill or note would become valid. He cannot disaffirm it until after he becomes of age; and if he then does it, there are cases which assert, when the contract has become executed, that he must restore the consideration received.

“4. When he has purchased and received personal property during infancy. When the contract has been executed by a payment of the price, if he would disaffirm it he should restore the property received. When the contract remains unexecuted, the purchase having been made upon credit, he may avoid the contract by plea during infancy or after he becomes of age, before he has affirmed it. It has been asserted in such case that he should be held to refund the consideration received for the contract avoided. (*Reeve's Dom. Rel.* 243.) He admits, however, that the current of English authorities is otherwise. If he had received property during infancy, and had spent, consumed, wasted or destroyed it, to require him to restore it, or the value of it, upon avoiding the contract, would be to deprive him of the very protection which it is the policy of the law to afford him. There might be more ground to contend for the right to reclaim specific articles remaining in his hands unchanged at the time of the avoidance of the contract. When he continues to retain the specific property, or any part of it, after he becomes of full age, it becomes his duty within a reasonable time to make his election. If such were not the rule he might continue to use for years a valuable machine until nearly worn out, and thus derive benefit from it, and yet avoid the contract and refuse to pay for it. And when after a reasonable time he continues to enjoy the use of the property and then sells it, or any part of it, and receives the money for it, he must be considered as having elected to affirm the contract; and he cannot afterward avoid payment of the consideration. This, as before shown, is the well-settled rule in relation to real estate purchased or leased, and the principles applied in those decisions appear to be equally applicable here.” (*Boody v. McKinney*, 23 *Maine R.* 517.)

Judge Shepley fortifies his opinion by authorities both English and American, the most of which are referred to in other places in this chapter, and are therefore not repeated here.

It has been frequently decided that acts of confirmation by an infant are required to be made with a knowledge that he is not liable on the contract, and this doctrine seems to be recognized by all the elementary writers upon the subject. (*Vide Hinely v. Margaritz*, 3 *Barr's R.* 428. *Norris v. Vance*, 3 *Rich. R.* 164. *Smith v. Mayo*, 9 *Mass. R.* 64. *Story on Con.* § 69. 1 *Parsons' Mercantile Law*, 5.) If it would not be regarded effrontery, however, in the face of such a current of authority, it might be questioned why ignorance of the law should avail an *adult* any more in this than in other cases. Here it must be remembered that the act of affirmance occurs after the infant has attained to adult age; and the general rule is well understood to be that no act can be avoided merely because it was entered into through ignorance of the law.

§ 53. In England an act has been passed, known as Lord Tenterden's act, declaring that no action shall be maintained whereby to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, or upon any ratification, after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be in writing, to be signed by the party to be charged thereby. (9 *Geo. IV, ch.* 14, § 5.)

They have a statute similar to the English statute in Maine, and in some other States; and when this is the fact the ratification in every case must be by a written instrument signed by the infant after he has attained his majority; and any paper which in the case of adults would amount to the adoption of the act of a party acting as agent would seem to be sufficient. (*Vide Hartley v. Wharton*, 11 *Adol. & Ellis's R.* 934. *Harris v. Wall*, 1 *Exch. R.* 122. *Mawson v. Blane*, 10 *ib.* 206.)

§ 54. According to authority, it would be difficult for an infant to do anything to *estop* him from avoiding his voidable contracts, on coming of age. Indeed it is held that the doctrine of estoppel is inapplicable to infants. (*Brown v. McCune*, 5 *Sand. [S. C.] R.* 228.) Where the defendant even fraudulently represented himself as being of full age, it was held that he was not estopped from setting up infancy as a defense to a contract entered into under such fraudulent representation. (*Merriam v. Cunningham*, 11 *Cush. R.* 40. *Burley v. Russell*, 10 *N. H. R.* 184.) But an opposite doctrine has been held in Texas. (*Kilgore v. Jordon*, 17 *Texas R.* 341.) But after he has become of age, he may take a course which will estop him from denying that his acts have been confirmed.

It has been held that if an infant suffers another to purchase his property without informing such person of his ownership, he cannot recover the property of the purchaser. (2 *Kent's Com.* 253, note 1, citing *Hall v. Simmons*, 2 *Rich. Eq. R.* 120. *But vide Norris v. Wait*, 2 *Rich. Law R.* 148.) So, again, a testamentary guardian by an infant devisee has no right to purchase the real estate of the testator at a sale under a surrogate's order; but if such a sale be made, and was beneficial to the ward, and he was present, and, instead of repudiating it, suffered eighteen years to elapse after he became of age without impeaching the conveyance, during which time the title had passed into the hands of innocent parties, he will be deemed to have waived the objection, and to have affirmed the sale. (*Bostwick v. Atkins*, 3 *N. Y. R.* 53.) A simple delay, however, of fourteen years to repudiate the conveyance of an infant, after coming of age, is not an affirmation. (*Urban v. Grimes*, 2 *Grant's Cases [Penn.]* 96.)

But it has been held, in the English court of chancery, that where the plaintiff acquiesced for three years after he attained his majority, in the sale of his lands by his attorney while he was a minor, it was too late to file a bill praying that the sale might be declared void. (*Salmon v. Cutts*, 5 *Eng. L. & Eq. R.* 93.) And further, that when it is sought to avoid a contract on the ground of infancy, the plea must show that there was a disaffirmance, and that this was within a reasonable time after the defendant's majority. (*Dublin, etc., Railway Company v. Black*, 16 *Eng. L. & Eq. R.* 556.)

Accepting the money arising from an irregular sale, by the infant, of her land, and saying she is satisfied with the sale after she becomes of age, will not estop her from denying the validity of the sale. (*Ackley v. Dygert*, 33 *Barb. R.* 166. *But vide Morris v. Stewart*, 14 *Ind. R.* 334.)

An infant of the years of discretion, standing by and seeing his property mortgaged, saying nothing, cannot afterward claim the property as his. (*Irwin v. Merrill, Dud. [Geo.] R.* 72.)

It is understood that an infant may remain quiescent after he has arrived to the age of maturity, in case of a conveyance of land, and still avoid the sale at any time before the statute has barred an entry. There may, however, be an acquiescence under such circumstances as to amount to an equitable estoppel upon the vendor. For example, it has been held, where an infant sold land, and, after

coming of age, saw the purchaser making large expenditures in valuable improvements, and said nothing in disaffirmance for four years, that "the circumstances were such as not to excuse this long silence;" and there being evidence that on several occasions the vendor had said, after age, that he had sold the land and been paid for it and was satisfied, and had authorized a proposition to be made for the purchase of the land, it was held that the sale was confirmed. (1 *Am. Lead. Cas.* 114, citing *Wheaton v. East*, 5 *Yerger's [Tenn.] R.* 41, 62.)

§ 55. As to what acts, after attaining full age, will amount to a ratification of the contract of an infant, has been elaborately discussed in a late case in the court of appeals of the State of New York. All that seems, however, to have been settled by the case is, that when an infant has purchased real estate, and has taken and continued in possession after becoming of full age, and has exercised acts of ownership over the same, he will be deemed to have ratified the contract of purchase. And further, that an infant cannot retain the benefits of his contract, and thus affirm it, after becoming of age, and yet plead infancy to avoid the payment of the purchase-money. (*Henry v. Root*, 33 *N. Y. R.* 526.) No new principle is settled in this case, and it is only important because of the high authority of the court that adjudicated it, and the exhaustive discussion of the question by one of the learned judges. In the course of the argument, Davies, J., who delivered the leading opinion of the court, took the broad ground, that the contracts of an infant, which are declared to be only suspended during his minority, may be revived and ratified by him on arriving at age, upon the same principles, and for the same reasons, and by the same means, as a debt barred by the statute of limitations may be revived and restored to its pristine vigor and efficacy; and the opinion is advanced that the current and generally received rule to the contrary originated mainly from the notion of the English judges that it was their peculiar duty to protect infants from their own acts of imprudence and folly; and that, their contracts being wholly void, something must be done equivalent to a new contract after coming of age, to make that legal and effective which before had no force or existence. Now, a bare acknowledgment is sufficient to take a case out of the statute of limitations, for the reason that the debt continues from the time it was contracted. A new promise merely rebuts the presumption of pay-

ment of the debt created by the statute, and the plaintiff recovers not on the ground of any new right of action, but that the statute does not apply to bar the old one. But in case of infants, the well settled doctrine is, that their contracts are more analogous to the debts of a bankrupt, which have been discharged and canceled by the bankrupt or insolvent discharge, and that, to make binding their contracts after they have attained their majority, acts must be done of an equal character or degree, as in case of a bankrupt. In the case of an infant, it is held with respect to his contract, that there never was any legal right capable of being enforced, and that the promise of the infant, after he becomes of age, to take upon himself a new liability, proceeds only upon a moral obligation existing before. Accordingly, it now stands adjudged, that the contract of an infant can be ratified only by an express promise, or what is equivalent to an express promise, made after the infant arrives at full age. And, notwithstanding the learned and elaborate argument in the case referred to, it does not appear that the court interfered with this universally received rule. The standards, therefore, which have been hereinbefore stated and laid down, may be regarded as binding and safe, until they shall be expressly overruled.

CHAPTER VII.

OF THE CONTRACTS OF INFANTS FOR NECESSARIES—WHEN AND HOW AN INFANT MAY BIND HIMSELF FOR NECESSARIES—WHEN HE MAY BIND OTHERS FOR NECESSARIES—WHAT ARE AND WHAT ARE NOT NECESSARIES—HOW THE QUESTION OF NECESSARIES IS TO BE TRIED—THE BURDEN OF PROOF.

§ 56. It is clearly agreed by all the books and the authorities, that the contract of an infant for necessities is neither void nor voidable. It is permitted, says Professor Parsons, for his own sake, that he may make a valid contract for these things; or otherwise, whatever his need, he might not be able to obtain food, shelter, or raiment. And the principles which govern this rule show plainly that it is intended only for his benefit, and is regarded and treated as an exception to a general rule. (*1 Parsons on Con.* 244, 245, 3d ed.)

This question of necessities as applied to infants involves several interesting principles, and therefore demands a close and somewhat extended examination.

§ 57. Matthew Bacon lays it down that infants are absolutely bound by their contracts for necessities in benignity to themselves, "for if they were not allowed to bind themselves for necessities, no person would trust them, in which case they would be in worse circumstances than persons of full age." (*Bac. Abr. Inf. I. 1.*)

Another writer says that the obligation of infants to pay for necessities is said to arise, not so much by virtue of any *contract* to do so, as on the ground of an implied legal liability, based on the necessity of their situation. This seems to be more in consonance with the theory upon which the acts of infants are usually treated. Precisely in the same manner as are idiots and lunatics, who are *absolutely* incompetent to make any contracts, yet, in both cases, it being necessary for the party to live, the *law* allows to any one supplying them a reasonable compensation. The infant's necessity, therefore, being the ground of his liability, it follows that, when no such necessity exists, all responsibility fails. (*Bing. on Inf. 87, note 1.*) It must appear in all cases that the things furnished were actually necessary, of reasonable prices and suitable to the infant's degree and estate, considerations which regularly must be left to the jury. (*Ive v. Chester, Cro. Jac. 560.*) But if the jury find that the things were necessities and of reasonable price, it will be presumed they had evidence of what they thus find; and they need not find particularly what the necessities were nor the price of each. Also, if the plaintiff declares for other things as well as necessities, or alleges too high a price for those that are necessary, the jury may consider of those things that were really necessities and of their intrinsic value, proportioning the damages accordingly. (*Popham's R. 151. Palmer's R. 361. 1 Leonard's R. 114. Goldsborough's R. 68. Godbolt's R. 219.*) Of course, in these cases of necessities, the infant may be sued and charged in execution, and he is not permitted to plead his infancy in defense, whether he is under or above full age at the time the action is commenced.

§ 58. The question of necessities is governed by the real circumstances of the infant, and not by what his situation may appear to be. An infant when at home under the care of his father, and *supported by him*, cannot be made liable for necessities. If he could be

made liable, the father would be deprived of the right of exercising his discretion as to the manner and degree of his support. (*Bainbridge v. Pickering*, 2 *W. Black R.* 1325. *Angell v. McLellan*, 16 *Mass. R.* 31. *Elwood v. Myers*, 2 *Heads' [Tenn.] R.* 33. *Hull v. Connolly*, 3 *McCord's [S. C.] L. R.* 6.)

By the common law, parents are bound to maintain their children during minority, and the same obligation is recognized by the civil law; but if the authority of the parent is abjured, without any necessity occasioned by the parent, all obligation to provide for the infant is at an end, and the infant himself is chargeable for necessities furnished for his support. It is said that this doctrine is vindicated by an attention to the consequences which would follow if a different principle were to obtain. Could a refractory or vicious son leave his father's house without being exposed to want, carrying with him a credit on his father wherever he might wander, the motive for submitting to authority might be materially impaired, and a great diminution of parental influence might ensue. One of the greatest restraints upon the bad passions and vicious propensities would be removed, if young persons should feel that they could flee their parent's presence without suffering in any of the essentials of life. (*Angell v. McLellan*, *supra*.) This doctrine is also enunciated or plainly implied in a large number of cases, both English and American. (*Vide Jones v. Colvin*, 1 *McMullen's [S. C.] R.* 14. *Smith v. Young*, 2 *Dev. & Bat. [N. C.] R.* 26. *Edwards v. Higgins*, 2 *McCord's Ch. [S. C.] R.* 16. *Guthrie v. Murphy*, 4 *Watts' [Penn.] R.* 80. *Cook v. Deaton*, 14 *Eng. C. L. R.* 232. *Story v. Perry*, 19 *ib*, 508. *Mortara v. Hall*, 6 *Sim. R.* 465.) Every person, therefore, who deals with an infant, is bound, at his peril, to inquire and ascertain the real circumstances of the infant, and whether he is in a situation to bind himself by a contract for necessities. (*Kline v. L'Amoreaux*, 2 *Paige's R.* 419. *Perrin v. Wilson*, 10 *Miss. R.* 451. *Story v. Perry*, 19 *Eng. C. L. R.* 508.) And many years ago, Lord Kenyon decided that an infant was not bound for his clothing, when it was proved that his father furnished him with all that was actually necessary. He says: "Whether he was living with his father or not, the person who dealt with him was bound to inquire and know who he was." (*Ford v. Fothergill*, 1 *Peake's N. P.* 230. *Vide also Cook v. Deaton*, *supra*.) The infant, however, may by his speech and conduct give such appearance as to render any inquiry unnecessary; and it has been further held, that an inquiry is not a

condition precedent to the right of recovery for the articles furnished. (*Dalton v. Gib*, 35 *Eng. C. L. R.* 49. *Brayshaw v. Eaton*, 7 *Scott's R.* 183.)

§ 59. If the minor be placed at school by the parent, or away to board, it will be presumed that the credit was given to the parent alone, and ordinarily in such cases the infant cannot bind himself to pay for necessities actually furnished. In like manner, if the infant has already supplied himself elsewhere, he is not bound to pay for similar articles subsequently purchased, although they were *per se* suitable, and although he may have avoided payment for those previously procured. But if the infant is living separate from his parents or guardian, he may bind himself for necessities, even though he had abundant ready money and it was not at all necessary that he have credit. In like manner, if the infant, with his parent's or guardian's consent, is carrying on a certain business as a means of support, he may bind himself to pay for articles suitable and necessary for that business.

In the State of Virginia, it is provided by statute that all contracts for money lent or advanced to or for the use of any student under age, at the Virginia Military School, or in any incorporated college of the State, or for anything sold or let to hire on credit to such student without the previous permission in writing of the parent or guardian of such student, shall be absolutely void. (*Code of 1849, ch. 143, § 1.*) This provision, however, does not apply to a person so selling or letting in expectation of immediate payment, if he shall, within ten days, give notice in writing, of the date, nature and amount of the sale or letting, to the president or other head of the institution. (*Ib.*)

In all cases the credit must be originally given to the infant, for otherwise he will never be liable, although the articles were actually necessary. (*Bing. on Inf.* 86, note 1. *Varney v. Young*, 11 *Vt. R.* 258. *Simms v. Norris*, 5 *Ala. R.* 42. *Dunscombe v. Tickridge*, *Aleyn*, 94. *Smith v. Young*, 2 *Dev. & Bat. R.* 26. *Maddox v. Miller*, 1 *Maule & Selw. R.* 738. *Burghart v. Augustein*, 25 *Eng. C. L. R.* 641. *Burghart v. Hull*, 4 *Mees. & Wels.* 727. *Wailing v. Toll*, 9 *Johns. R.* 131. *Rivers v. Gregg*, 5 *Rich. Eq. R.* 274. *Rundel v. Keeler*, 7 *Watts' [Penn.] R.* 237. *Nicholson v. Wilborn*, 13 *Geo. R.* 467.)

§ 60. As to the manner in which an infant may bind himself for necessities, the authorities do not in all respects agree. It would

seem, however, to be settled that he cannot bind himself under seal, or by parol, to pay *any certain sum* for necessities, nor by any form of contract which on legal principles excludes an inquiry into the consideration; and should an infant promise to give an unreasonable price for necessities, he would not be bound by the promise. It may therefore be said, that the contract of an infant for necessities, *quatenus* a contract, does not bind him any more than his bond would; but only as an infant must live, as well as an adult, the law gives a reasonable price to those who furnish him with necessities. (*Bac. Abr. Inf. I. 1, page 134.*) By the current of authorities however, it seems that an infant may enter into a single bill for the payment of necessities, and that an action of debt will lie on such obligation. (*Ib.*) So an infant may bind himself in an assumpsit for payment of necessities, and an action on the case lies against him upon the promise for this, but in the nature of an action of debt. It also seems clear, that if an infant becomes indebted for necessities, and the party takes a bond from the infant, that this will not drown the single contract, because the bond has no force. But it is agreed that an *insimul computassit* will not lie against an infant, though it be for necessities; for he, not having discretion, is not to be liable to false accounts. (*Ib. and cases cited.*)

§ 61. It would seem that the promissory note given by an infant for necessities has no obligatory force as such. (*Buler v. Young, 1 Bibb's R. 519. McCrillis v. Howe, 3 N. H. R. 348. McMin v. Richmond, 6 Yerger's [Tenn.] R. 9. Burchell v. Clary, 3 Brevard's R. 194. Swasey v. Vanderheyden, 10 Johns. R. 33. Fenton v. White, 1 Southard's [N. J.] R. 100. Hanks v. Deal, 3 McCord's [S. C.] R. 227. 20 Am. Jur. 285.*) It has, however, been held that if the note is not negotiable, or if negotiable not yet negotiated, so that the consideration may be examined into, the *payee* may sue the infant *on the instrument* and recover the just value of the necessities, whether equal to or less than the face of the note. (*Earle v. Reed, 10 Metc. R. 387. Dubois v. Wheddon, 4 McCord's R. 221. Haines v. Tenant, 2 Hill's [S. C.] R. 400. And vide Stone v. Dennison, 13 Pick. R. 1.*) And the fact, as has been properly suggested by one writer, that the payee might not be able to recover the whole amount of the notes, but would be obliged to prove the value of the necessities, and take judgment *pro tanto*, seems to constitute no technical objection to a suit *on the instrument*,

for it is admitted that between adults a note may be apportioned and judgment given for that part of the consideration which was good. (*Parish v. Stone*, 14 *Pick. R.* 198. *And vide Harrington v. Stratton*, 22 *ib.* 516. *Goodwin v. Morse*, 9 *Metc. R.* 278.) As the same writer further suggests, the analogy of the single bill would seem to support the position of the later cases, for, as has been seen, when the consideration is open to inquiry, the instrument might be declared on in a suit against an infant as well as an adult. Neither would the infant gain any *protection* by allowing him to defeat an action on the note, for he would be compelled to levy the same amount on a *quantum valebant*. Protection is the *sole end* of the infant's privilege, and the latter ought not to be extended further than the former demands. But the point may be considered as not fully settled, and in practice the general count for goods sold and delivered should always be added. (*Bing. on Inf.* 87, note 1, *sub.* 2.)

§ 62. But when the action against the infant is for necessities, no express promise is requisite to be proved; a promise will be implied if the articles furnished were actually for necessities. This doctrine is in strict accordance with the principles upon which an infant is made liable for necessities. The rule and the reason of it are well illustrated in the decision of a case in the supreme court of the State of New York. The action was brought to recover for the maintenance of the defendant whilst an infant, and for necessities furnished at the same time. No specific promise to pay was established by the evidence. The learned judge, in delivering the opinion of the court, said: "An express promise, I apprehend, need not be proved, in order to render an infant liable for necessities. When the plaintiff's demand is not for necessities, and the issue is upon a new promise after the defendant came of age, an express promise must be proved; because, there never having been any legal obligation on the part of the defendant, he cannot be legally liable without such promise. A moral obligation is sufficient to support an actual promise, but will not raise or support an implied one. But an infant is liable for necessities in the same manner as an adult is liable; and his contract or promise to pay is established in the same manner. If an infant direct a tailor to make him a suit of clothes, an express promise to pay for them is not necessary in order to make him responsible; or, if he be accommodated with board and lodging suitable to his condition, while

pursuing his academical or professional studies, he is bound to pay what they were reasonably worth, though no actual promise to pay can be proved. The promise is implied, and, being for necessities, it is legal and binding. *Gay v. Ballou*, 4 *Wend. R.* 403. *Sands v. Stockton*, 14 *B. Mon. R.* 232.)

§ 63. The manner in which an infant may bind himself is well illustrated in the decision of a case in the supreme judicial court of Massachusetts. A boy, fourteen years of age, whose father was dead, entered into an agreement with the defendant, to serve him until he was twenty-one years of age, for his board, clothing and education, and the contract was performed on both sides; but the boy, on coming of age, brought his action for his services, alleging that they were worth more than the support and education furnished him by the defendant. The jury found for the defendant, and the plaintiff moved for a new trial. Shaw, Ch. J., in giving the opinion of the court, said: "A contract for subsistence, clothing and education, is a contract for necessities, and is one, therefore, which the minor has capacity to make, and which, if reasonable and beneficial, will be supported by law. Most of the cases, where it has been decided that a minor cannot be held on his express contract for necessities, are those where the action is founded on the express obligation, and where, from the form of the action, the consideration cannot be inquired into; as an action on a bond with a penalty, which implies a consideration, and where an inquiry into the consideration is precluded by the forms of pleading and proof. So on an *insimul computassent*, when the action is founded upon the act of accounting and the admission of the balance, and no further inquiry into the consideration and terms of the contract can be gone into. These actions are founded on the assumption that the party has full power to bind himself by any lawful contract, and they only open the question whether he has so bound himself. But in the other forms of obligation and of action, and where it can always be open to inquiry what the nature and terms of the contract were, and whether the contract was reasonable and beneficial, a minor may as well be bound by an express as by an implied contract for necessities. This is often beneficial to the minor, and enables him to avail himself of any stipulations in his favor." (*Stone v. Dennison*, 13 *Pick. R.* 1.) This is sound reasoning, and commends itself to the good sense of the discriminating mind.

It is proper to observe, also, that the fictions of legal proceedings which formerly prevailed, are nearly or quite superseded by the present practice in our courts. The system now prevalent in most of the American States, and in England, is designed, so far as is practicable, to enable parties to ascertain and preserve their rights, divested of the technicalities and subtleties of former systems. Form now yields to substance, and the great object is to mete out justice between the parties, without much respect to the form of the action or proceeding.

§ 64. An infant may sometimes bind others on his contract for necessities, and it is important to understand the rules and precedents upon the subject. And here it may be stated, as a general proposition, that the only ground upon which an infant can bind others by his contract, is that of an express or implied agency, and unless the necessities are purchased with the assent, express or implied, of the father or guardian, or the contract be subsequently adopted by him, he is not responsible. The moral obligation of a father, for example, to support his child, does not make him legally liable to pay his child's debts; and to charge a father, on his son's contract, the same circumstances must be shown, as to charge an uncle, a brother, or any third person. The son need not, however, have an express authority to bind his parent, for an authority may be implied under certain circumstances, and it is always a question for the jury, whether the circumstances are sufficient for that purpose. Should the father know that his minor child was being boarded and clothed by another, and fail to dissent or take the child away, his assent would probably be implied, and he would be liable for the expense. So if a father should pay a debt of his minor child for necessities, and make no objection to the tradesman, and give him no notice not to trust his son again, this would probably imply an authority to purchase again, even though the father, unknown to the tradesman, should forbid the son to contract any more, and place him under the care of a friend with directions to supply him. This doctrine is abundantly sustained by a long series of authorities in England, and by not a few in our own country. (*Vide Rolfe v. Abbot*, 25 *Eng. C. L. R.* 436. *Mortimer v. Wright*, 6 *Meeson & Welsby's R.* 482. *Seaborn v. Maddy*, 38 *Eng. C. L. R.* 293. *Baker v. Keen*, 3 *ib.* 449. *Blackburn v. Mackey*, 11 *ib.* 295. *Fluck v. Tollemache*, 5 *ib.* 296. *Shelton v. Springett*, 63 *ib.* 452. *Clements*

v. Williams, 34 *ib.* 291. *Law v. Wilkins*, 33 *ib.* 193. *Nichols v. Allen*, 14 *ib.* 198. *Gordon v. Potter*, 17 *Vt. R.* 348. *Varney v. Young*, 11 *ib.* 258. *Hunt v. Thompson*, 3 *Scam. [Ill.] R.* 180.)

Generally, it may be affirmed that, if the father allow his son a reasonable sum for his support, this will rebut any presumption of an implied authority in him to bind the father for necessities. (*Crantz v. Gill*, 2 *Esp. R.* 471.)

§ 65. Whether if a father turn away his child from home, or neglect to provide for him, or so cruelly treat him that he cannot remain under the paternal roof, is alone sufficient to make the father responsible to any one supplying the child under such circumstances, seems just now to be in doubt. Certainly the rule applicable in the case of husband and wife is different from that of parent and child. If the husband abandons his wife, or sends her away, he is liable for her necessities, and he sends credit with her to that extent; and it is sometimes supposed that the same rule would apply in case of a father abandoning or neglecting his infant child. This is erroneous. There is no doubt but a parent is under a natural obligation and duty to furnish necessities for his infant children; but how that obligation is to be enforced is not so clear. (*Raymond v. Loyl*, 10 *Barb. R.* 485.)

In one case in the supreme court of the State of New York, the reporter makes the court say that, if the parent neglects that duty, any other person who supplies such necessities is deemed to have conferred a benefit on a delinquent parent, for which the law raises an implied promise to pay; though, under the circumstances of the case, the parent was held not be liable. (*Van Valkenburgh v. Watson*, 13 *Johns. R.* 480.) In another case in the supreme court, the learned chief justice, who delivered the opinion of the court, asserted that "the duty of a parent to maintain his offspring is a perfect common law duty;" but that was not the question before the court for adjudication. (*Edwards v. Davies*, 16 *Johns. R.* 285.) In a case in the late court of chancery of the State of New York, the chancellor said that a stranger may furnish necessities for the child, and recover of the parent compensation therefor, when there is a clear and palpable omission of duty on the part of the parent in supplying a minor child with necessities; but the relief asked for in the case was not granted. (*In re Rider*, 11 *Paige's R.* 188.) The same doctrine is advanced by Chancellor Kent, in his commentaries on

American law, predicated upon two or three authorities of more or less weight. (2 *Kent's Com.* 193.) This is the authority of very eminent jurists, and yet a careful examination of the late cases will throw doubt upon the position, if it does not lead to a different conclusion. There is one very strong case on this point, decided by the supreme court of the State of Vermont, in the course of which Redfield, J., said: "But there is one defect in the case, which we think must clearly and indisputably preclude any recovery against the father. It does not appear that the father ever gave the son any authority, either expressly or by implication, to pledge his credit for the articles; but the contrary. And, unless the father can be made liable for necessities for his infant child, against his own will, then, in this case, the plaintiff must fail to recover. I know there are some cases, and *dicta* of judges, or of elementary writers, which seem to justify the conclusion that the parent may be made liable for necessities for his child, even against his own will. But an examination of all the cases upon this subject will not justify any such conclusion." And further on: "It is obvious that the law makes no provision for strangers to furnish children with necessities against the will of parents, even in extreme cases. For if it can be done in extreme cases, it can be done in every case where the necessity exists; and the right of a parent to control his own child will depend altogether upon his furnishing necessities suitable to the varying taste of the times. There is no stopping place short of this, if any interference whatever is allowed. If the parent abandons the child to destitution, the public authorities may interfere, and, in the mode pointed out by statute, compel a proper maintenance." (*Gordon v. Potter*, 17 *Vt. R.* 350.) This reasoning would seem to well nigh cover the whole ground, though it is by no means conclusive.

§ 66. In England the parent may be compelled by statute to support a minor child, and, consequently, it is there held that the only remedy, in case the child is abandoned to destitution, is that pointed out by the statute. In a leading case, Lord Abinger, C. B., said, "in point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be." And that "the mere moral obligation on the father to maintain his child, affords no inference of a legal promise to pay his debts." Still further, that "to bind the father in point of law for the debt

incurred by his son, you must prove that he has contracted to be bound, just in the same manner as you would prove such a contract against any other person." (*Mortimer v. Wright*, 6 *Meeson & Welsby's R.* 482.) The proceedings under the statute to make the father liable, are entirely independent of contract, and the liability is fixed by order of court. In another case in England, Abbott, C. J., left it to the jury to consider whether they could infer that the order by the minor, for the articles, was given by the assent and with the authority of the father. He said "that a father would not be bound by the contract of his son, unless either an actual authority was proved, or circumstances appeared from which such an authority might be implied." (*Baker v. Keene*, 3 *Eng. C. L. R.* 449.)

In another case the same learned chief justice held that a father was not liable for clothes furnished to his son being under age, unless an express or implied authority was shown. (*Blackburn v. Mackey*, 1 *Carr. & Payne*, 1. *S. C.*, 1 *Eng. C. L. R.* 295.) And Mr. Chitty, in his excellent work on contracts, states the doctrine in broad terms: "There appears, indeed, to be no responsibility on the part of a father, even for necessary goods supplied to his son, unless there be some proof of a contract express or implied; and that there must be a prior authority, or a subsequent recognition of the claim." (*Chitty on Con.* 117, *Perkins' ed.*)

§ 67. In case of desertion by the father of his minor children, whether he would be liable to third persons who furnish them necessaries, may be regarded in England, *questio vexatio*. In one case in the court of king's bench, decided in 1836, Sir John Campbell, attorney-general, said: "Then the question is, whether a father, if he desert his legitimate child, be not liable in assumpsit to any one who provides food and clothing for it. There is no express decision on the point. The obligation must be as strong in the case of a child as in that of a wife. The foundation, in one case, is the duty on the part of the husband to provide for his wife; that foundation exists in the other case, because the primary duty is equally imperative." Alexander, the counsel opposed, said: "It is not true that by the common law a father is bound to maintain his child. There are indeed statutory means of compelling parents to provide for their children; but the statutes authorize only particular modes of enforcing the natural duty; and when such modes are not resorted to, no contract can be implied like that now con-

tended for. There is no express decision on the point; and, with the exception of foreign treatises, the text-books are nearly silent upon the subject." Lord Denman, C. J., said: "The general question is important; but the facts do not raise it. In order that the law should imply a liability in the father to repay another for supporting his child, it is absolutely necessary that desertion of the child by the father should be proved. Now that is not shown here." Patteson, J., said: "I agree that the question does not arise. The circumstances are peculiar." The learned judge then states the case, and adds: "This leaves untouched the question how far a party who finds a child in a state of destitution, and provides for it, can sue its father." Coleridge, J., said: "It is best to say nothing on the general question. For the purpose of this case, I will assume (what is not to be understood as my opinion at present) that the general liability is as contended by the attorney-general." The case was decided without authoritatively passing upon the general question. (*Urmston v. Newcombe*, 31 *Eng. C. L. R.* 393. *S. C.*, 4 *Adolph. & Ell. R.* 899.)

But in another case, the law was declared to be well settled that without some contract express or implied, the father is not liable for necessaries. *Jervis*, C. J., said: "If a father turns his son upon the world, the son's only resource, in the absence of anything to show a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's duty. (*Shelton v. Springett*, 20 *Eng. L. & Eq. R.* 281.) Neither can the question be regarded as authoritatively settled in *this* country. In a leading case in the State of Connecticut, the court said: "Parents are bound by law to maintain, protect and educate their legitimate children during their infancy. This duty rests in the father, but because the father has abandoned his duty and trust, by putting the child out of his protection, he cannot thereby exonerate himself from its maintenance, education and support. The duty remains, and the law will enforce its performance, or there must be a failure of justice. The father having forced his child abroad to seek sustenance under such circumstances, sends a credit along with him, and shall not be permitted to say it was furnished without his consent or against his will." (*Stanton v. Wilson*, 3 *Day's R.* 37. But *vide Finch v. Finch*, 22 *Conn. R.* 411, where the case is commented upon, and the doctrine denied.)

§ 68. In the States of New York and Massachusetts, and probably in most of the states of the Union, parents may be compelled, by similar statutes to those in England, to support their minor children, and the later decisions seem to hold that the only remedy, in case of neglect of that duty, is that pointed out by the statutes. In one case in the supreme judicial court of Massachusetts, before referred to upon another point, Parker, C. J., delivering the opinion of the court, said: "The liability of the father must depend altogether upon the principles of law which govern the relation of parent and child. The father is obliged to support his children while they remain part of his family. Perhaps if he fail to furnish them with clothing and food necessary to the support of life, any one who furnishes such necessities may maintain an action against the father, upon the presumption of an assent on his part. Perhaps, also, if he cruelly and causelessly turn them out of doors, they would carry with them a credit on the father, for the means of support; although it may be questioned whether, in such a case, the support of such children should not be provided for pursuant to the statute, requiring the kindred of poor persons within certain degrees to support them. But upon these points, the case before us does not require an opinion." (*Angel v. McLellan*, 16 *Mass. R.* 130.) This case leaves the question a little in doubt as to whether the minor can make the parent liable for necessities, except by the parent's authority, express or implied, or in the manner pointed out by statute.

In the supreme court of the State of New York, a case has recently been decided, in which the doctrine has been avowed, as understood by the reporter, and justified by the opinion which was delivered, that "there is no legal obligation on a parent to maintain his child, independent of the statutes. Hence a third person who supplies an infant with necessities, cannot maintain an action against the parent therefor, unless the latter has expressly or impliedly *contracted* to pay the amount." (*Raymond v. Loyle*, 10 *Barb. R.* 483.) This position, however, was not necessary to be taken to determine the case, and it is not absolutely certain that the decision by the entire court was put upon that ground. So the question would seem to be still open in the State of New York; but considering the evident leaning of judicial opinion in all the later cases, it is altogether probable that in this country, as in England, the liability of the parent for necessities fur-

nished to his minor children will ultimately stand solely upon contract.*

§ 69. There is no arbitrary rule by which to determine what are necessities for which infants may bind themselves by their contracts. The term necessities is a relative expression, to be construed with reference to the actual rank, fortune and age of the infant. All agree, however, that the term is not to be strictly confined to such things as are requisite for bare subsistence or support. It should receive a somewhat liberal construction, and be extended to cover all such things as the condition of the infant reasonably requires. Lord Coke, one of the most ancient authorities upon the subject, extends it to the "necessary meat, drink, apparel, physic" of the infant, "and such other necessities; and likewise for his good teaching and instruction whereby he may profit himself afterward." (*Co. Litt.* 172.)

The articles must be *bona fide*, purchased for use and not for mere ornament. They need not be such as a person cannot do without, or for the want of which, the infant might be uncomfortable; but they must, in all cases, be suitable to the condition, rank, fortune and circumstances of the party.

The term necessities includes the necessary food of the infant, but not dinners, confectionery and fruit, supplied him at his own rooms, for a party of friends. It also includes his lodgings and house rent; but not the rent of a building for carrying on a trade, or manual occupation. The term also includes *proper education*; and what would be considered a *proper* education would depend upon the circumstances and taste of the party. A good common

* The conclusion to which Professor Parsons has come upon this subject, appears when he says: "In this country, the rule of law varies in the different states. In most of them in which the question has come before the courts, the legal liability of the parent for necessities furnished to the infant is asserted, unless they are supplied by the father; and it is put on the ground that the moral obligation is also a legal one, and some of our courts have declared this quite strongly. In other states the present English rule has been declared to be law, and agency and authority are held to be the only ground of such liability.

The law can hardly be considered as positively settled either in England or in this country, but we would state as strongly prevailing rules here, that when goods are supplied to an infant which are not necessities, the father's authority must be proved to make him liable; where they are necessities the father's authority is presumed unless he supplies them himself, or was ready to supply them. When the infant lives with the father, or under his control, his judgment as to what are necessities will be so far respected, that he will be held liable only for those things furnished to the infant to relieve him from absolute want. When the infant does not live with the father, but has voluntarily left him, the authority of the father must be strictly proved, unless, perhaps, in cases of absolute necessity; and when he has been deserted by the father, or driven away from him, either by command or by cruel treatment, then the infant carries with him the credit and authority of the father for necessities." (*Parsons on Con.* 252-254.)

school education would be regarded as proper and necessary in all cases; and for some a knowledge of the learned languages might be included. But a regular collegiate education, for a person in ordinary circumstances, would not be included within the class of necessities; neither would instruction in singing and dancing, at least it was formerly so held, but a change of manners may, possibly, now warrant a different decision. (*Siderfin's R.* 446.)

Instruction in reading and writing is always regarded as necessary; and the reason given in an English case was, that it was for the benefit of the realm. (*Manley v. Scott*, 1 *Sid. R.* 112.) And in a case in the New York supreme court, the learned judge, speaking of schooling generally, said: "It was said on the argument that 'schooling' is not a necessary. And Mr. Chitty says, it *seems* a parent is not legally bound to educate his child. (*Chit. on Con.* 140.) A parent is almost the sole judge of what is necessary. But if a parent is liable to a third person, I hope it will never be decided that sending to a common school, at a suitable season, and to a reasonable extent, is not necessary in this country." (*Raymond v. Loyle*, 10 *Barb. R.* 489.)

The board of four horses for six months, the principal use of which was in the business of a hackman, is held not to be within the class of necessities for which an infant is liable, although the horses are occasionally used to carry his family out to ride. (*Merriam v. Cunningham*, 11 *Cush. R.* 40.) So also it has been held that an infant cannot be held to pay for grain furnished for horses owned by a firm of which he was a member, though the horses were employed in the usual business of the firm, and though he was emancipated by his father. (*Mason v. Wright*, 13 *Metc. R.* 306.)

It has been held that a yoke of oxen, purchased by a lad seventeen years old who was carrying on a farm for his mother, a widow, and his guardian, and kept on the farm, may be a necessary according to the finding of a jury; and that the judge should not take such a case from the jury. (*Moheny v. Evans*, 51 *Penn. R.* 80.)

Suitable clothing comes within the term necessities, but not suits of satin and velvet with gold lace, nor racing jackets, nor cockades for an infant captain's soldiers, although regimentals for a volunteer and livery for a captain's servant have been allowed; horses, saddles and bridles, liquor, pistols, powder, whips, fiddles, coach hire or chronometer, balls and serenades, work bestowed on

articles for the infant's customers, goods to trade with, money lent, counsel fees and expenditures in a lawsuit, money paid for the insurance of the infant's property, are all, as a general rule, excluded from the class of necessities, and will not be allowed against the infant.

§ 70. As before observed, no authoritative precedent can be given which shall be binding in all cases, as each case is governed more or less by its own peculiar circumstances, taking into consideration the age, fortune, condition and rank in life of the infant; and yet the rules laid down may serve as illustrations by which to determine the various cases that may arise. For example, horses are declared *generally* not to be within the class of necessities; and yet if the infant was possessed of sufficient means and was in feeble health and of suitable age, and was advised by his physician to take exercise on horseback, a contrary rule would undoubtedly be adopted. So, also, money lent cannot generally be recovered of an infant on the ground of necessities, even though it were lent for the purchase of necessities; and yet if the money were lent to procure a liberation from arrest on a debt for necessities, or if the infant was in execution, or if the money advanced was in fact laid out by the lender for the necessities—in all these cases the money lent is recoverable.

Money paid to a third person at the request of the minor, for necessities actually furnished him, is recoverable of the infant and is included within the class of necessities.

So if an infant give his promissory note for necessities and procure another to sign it as surety, and the surety subsequently pay the note, he may recover the amount of the infant. But articles furnished to make repairs to an infant's estate are not regarded as within the class denominated necessities. (*West v. Gregg's, Adm.*, 1 *Grant's [Penn.] R.* 53.) The authorities, both English and American, upon the question what are necessities, are very numerous, and will tend to illustrate every possible case which can arise. (*Bing. on Inf.* 87, note 1, sub. 4. *Peters v. Fleming*, 6 *Mees. & Wels. R.* 43. *Brookes v. Scott*, 11 *ib.* 67. *Wharton v. McKenzie*, 48 *Eng. C. L. R.* 606. *Burghart v. Augustine*, 25 *ib.* 690. *Harrison v. Fane*, 39 *ib.* 556. *Charles v. Boynturn*, 32 *ib.* 433. *Beralles v. Ramsey*, 3 *ib.* 32. *Tuberville v. Whitehouse*, 11 *ib.* 326. *Hussley v. Holt*, 19 *ib.* 297. *Kirten v. Elliot*, 2 *Bulstr. R.* 69. *Love v. Griffith*, 1 *Scott's*, 458. *Macknell v. Bachelor*, *Cro. Eliz.*

583. *Coates v. Willson*, 5 *Esp. R.* 152. *Clark v. Leslie*, *Ib.* 28. *Probart v. Knouth*, 2 *ib.* 472, note. *Dilk v. Kingsley*, *Ib.* 480. *Earle v. Peale*. 1 *Salk. R.* 387. *Dorly v. Boucher*, 2 *ib.* 274. *Hands v. Slaney*, 8 *T. R.* 578. *Clowes v. Brooks*, 2 *Str. R.* 1100. *Whyhall v. Champion*, *Ib.* 1083. *Middleburg College v. Chandler*, 16 *Vt. R.* 683. *Bradley v. Pratt*, 23 *ib.* 378. *Abell v. Warren*, 4 *ib.* 152. *Rent v. Manning*, 10 *ib.* 225. *Corm v. Coburn*, 7 *N. H. R.* 368. *Smith v. Bean*, 8 *ib.* 15. *Phelps v. Worcester*, 11 *ib.* 51. *The M. F. Insurance Co. v. Noyes*, 32 *ib.* 345. *Beebe v. Young*, 1 *Bibb's R.* 519. *Glover v. Ott*, 1 *McCord's R.* 524. *Rainwater v. Dunham*, 2 *Nott & McCord's R.* 524. *Grace v. Hale*, 2 *Humph. R.* 27. *Haines, Adm. v. Tarrant*, 2 *Hill's [S. C.] R.* 400. *Walker v. Simpson*, 7 *Watts & Serg. R.* 83, 88. *Randall v. Sweet*, 1 *Denio's R.* 460. *Hart v. Prates*, 1 *Jur. R.* 623. *Stone v. Withipool, Latch. R.* 21. *Smith v. Oliphant*, 2 *Sandf. [S. C.] R.* 306. *Marlow v. Pitfield*, 1 *P. Wm. R.* 558. *Ellis v. Ellis*, 1 *Ld. Raymond's R.* 344. *Brayshaw v. Eaton*, 5 *Bingham's N. C.* 231. *Swift v. Bennett*, 10 *Cushing's R.* 436. *Stanton v. Wilson*, 3 *Day's R.* 57.

§ 71. Necessaries for the wife of an infant are regarded in law as necessaries for him, and the infant is liable to pay for them; though it has been held that if the articles were furnished in order for the marriage the infant husband would not be chargeable, though she use them. Nursing the lawful child of an infant will also be considered as coming within the class of necessaries; and likewise articles furnished for the necessary comfort of his children. It would seem also from authority, that an infant is bound for necessaries furnished for his wife *dum sola*; and yet it is not easy to reconcile this authority with that which holds that the infant is not chargeable for necessaries furnished the wife for her marriage. But this rule must be understood as applying only to such debts as the wife was legally liable to pay at her marriage.

In the State of New York it is provided by statute that a judgment may be recovered against the husband and wife jointly, for any debt of the wife contracted before marriage, but that such judgment and the execution issued thereon shall bind the separate estate and property of the wife only, and not that of the husband; except that if the husband acquire the separate property of his wife, or any portion thereof by any antenuptial contract, or otherwise, he is made liable for the debts of his wife contracted before

marriage, to the extent only of the property so acquired. (*Vide N. Y. Laws of 1853, ch. 576. Parish v. Straud, Barnes' notes 95. Rainsford v. Fenwick, Carter's R. 215. Butler v. Brick, 7 Metc. R. 164. Turner v. Trisley, 1 Stra. R. 168. Roach v. Quick, 9 Wend. R. 23.*) So it seems to be settled that the funeral expenses of a deceased husband or wife, dying without assets, are within the class of necessities, and are chargeable upon the survivor. (*Chapple v. Cooper, 13 Mees. & Wels. R. 252.*)

Although an infant is not in general absolutely liable for money or goods supplied him for trade, still so much as was actually consumed by him as necessities in his own family he would be chargeable for. (*Turberville v. Whitehouse, 1 Carr. & Payne's R. 94. S. C. 11 Eng. C. L. R. 326.*)

Many articles which at first sight appear to be necessities for an infant, on investigation may prove not to be so in reality; and in that case the infant is not responsible; and there being no inflexible rule upon this subject, an inquiry into the situation and resources of the infant would seem to be in every case almost indispensable as a condition precedent to recover.

In addition to the authorities already cited, others may be referred to as bearing more or less upon this question. (*Montara v. Hall, 6 Sim. R. 465. Wailing v. Toll, 9 Johns. R. 141. Guthrie v. Murphy, 4 Watts' R. 80. Butler v. Brick, 7 Metc. R. 164. Tupper v. Cadwell, 12 ib. 559.*)

§ 72. As has been before asserted, the law distinguishes between persons upon this subject of necessities, as between a nobleman and gentleman's son; also in point of time and education, as at school or otherwise. The infant is not to be looked upon in the same condition when a school-boy as when of riper years. This illustrates the statement that the condition of the infant is to be considered in settling the question of necessities for an infant.

It is asserted by Bingham, upon authority, that, if an infant promises another that if he will find him meat, drink and washing and pay for his schooling, he will pay a certain sum yearly, an action on the case lies upon the promise; for learning is as necessary as other things; and though it is not mentioned what learning this was, yet it will be intended what was fit for him till it be shown to the contrary on the other part; and though he, to whom the promise was made, do not instruct the infant but pays another for it, the promise of repayment is good. (*Bing. on Inf. 88.*)

So in an action of assumpsit for labor and medicines in curing the defendant of a distemper, nonage was pleaded by the defendant, and the plaintiff replied, necessities generally. Upon demurrer to this replication it was objected that the plaintiff had not assigned in certain, how or in what manner the medicines were necessary; but the court adjudged the replication good. (*Id. Huggins v. Wiseman, Carth. R. 110.*) The doctrine here stated shows that presumptions may be indulged in these as in all other cases of contract. So it has been held that if an infant comes to a stranger, who instructs him in learning and boards him, there is an implied contract in law, that the party should be paid as much as his board and schooling are worth, provided the condition of the infant was such as to make him liable for necessities furnished to him. (*Bac. Abr. Infancy, I 1, p. 134.*) This shows that the contract of an infant may be implied as well as that of an adult.

§ 73. The question of necessities is regarded as a mixed question of law and fact. The court will decide whether the articles furnished come within the class of necessities suitable to any one, whether infant or adult, in the defendant's situation and condition of life; and should the court decide in the affirmative upon that proposition, then the jury are to judge and decide whether the particular articles furnished were actually necessary under the circumstances of the individual case. It is not easy in all cases to determine the respective functions of the court and jury in the trial of these questions; for it has been held that the court are sometimes judges of the *quantity*, as well as the quality, of the articles furnished. And, again, it has been decided that the jury are not always the sole judges of what is necessary and proper; and if they find a verdict contrary to the opinion of the court, a new trial will be granted. But, notwithstanding the difficulty in drawing a clear and well defined line of demarkation between their respective jurisdictions, the above rule as to the legitimate duties of the court and jury in these cases, will generally be found to be practically correct. There are several authorities tending to illustrate and establish this rule. (*Bing. on Inf. 87, note 1, sub. 5. Peters v. Fleming, 6 Mees. & Wels. R. 42. Burghart v. Augustine, 25 Eng. C. L. R. 600. Wharton v. McKenzie, 48 ib. 606. Harrison v. Fane, 39 ib. 556. Stanton v. Willson, 3 Day's R. 37. Beebe v. Young, 1 Bibb's R. 19. Swift v. Bennett, 10 Cush. R. 436. Rent v. Manning, 10 Vt. R. 225. Glover v. Ott, 1 McCord's R. 572.*

Bouchett v. Clarey, 3 *Brevard's R.* 194. *Phelps v. Worcester*, 11 *N. H. R.* 51. *Eckbert, Admr., v. Lines*, 6 *Watts & Serg. R.* 80. *Rundel v. Keeler*, 7 *Watts' R.* 237. *Grace v. Hale*, 2 *Humph. R.* 27.)

§ 74. In an action brought against an infant, if the plaintiff put in a simple replication of *necessaries* to the defendant's plea of infancy; the defendant is not bound to prove his infancy, for the fact of infancy is admitted by the replication; and the burden of proving the articles *necessaries* is, of course, always on the plaintiff. It has been supposed, from the language of the court in some cases, that, in order to make out a *prima facie* case, the plaintiff must not only show that the articles came within the *class* of *necessaries*, suitable to a person in the position, condition and circumstances of the defendant, but that he must also show the infant's actual, or, at least, apparent want, necessity or destitution, at the time the articles were furnished. It is probable, however, that the rule is not thus strict, and that the replication of "necessaries suitable to the then estate, degree and condition in life of the defendant," throws on the plaintiff the burden of proving only the infant's degree, fortune or occupation, and standing in life, and that the articles were, in their *nature, quality and quantity*, necessary and suitable to every one in that situation and condition. In one case, decided before a full bench in England, Baron Parke gave an opinion *obiter*, "that if *prima facie* and abstractedly from circumstances, the articles were proper for his rank and station in life, that would be sufficient for the plaintiff to prove; if he was supplied *aliunde*, that must be proved by the defendant." (*Burghart v. Hall*, 4 *Mees. & Wels. R.* 731.) And this seems to be in accordance with the *practice* at Nisi Prius.

It appears, from the Nisi Prius Reports, that in one case on trial the plaintiff proved only that the defendant was a lieutenant in the militia, and had been introduced to the plaintiff by a person of distinction, and then proved the delivery of the goods and their value, and rested his case. The defendant then went into rebutting testimony. (*Ford v. Fothergill*, 1 *Esp.* 211.) And in another case reported, it does not appear that the plaintiff proved any more than that the defendant was the son of a certain lord, and that the clothes were furnished at a certain time and at reasonable charges on the part of the *defendant*, witnesses were then called on the defense. (*Story v. Perry*, 19 *Eng. C. L. R.* 508.) The same course appears to have been taken in still other cases on the

trial at Nisi Prius. (*Crantz v. Gill*, 2 *Esp.* 471. *Steedman v. Rose*, 41 *Eng. C. L. R.* 232.) These, of course, are not exactly authority on the point, because the question does not seem to have been raised and passed upon by the court; and yet, from the fact that the question was not raised, we may infer that the understanding of the court and counsel was in accordance with the practice which was adopted.

§ 75. As has been very pertinently suggested by one writer upon the subject, the facts concerning the infant's previous provision or supply and the like, being necessarily so much more peculiarly within his own knowledge, should, it seems, more properly come in as *rebutting* testimony, and by way of special defense. It is a general rule of evidence, that the onus is on the party within whose peculiar means of information the fact lies, and it would not seem that this case should be an exception to the rule. This throws no greater burden on the infant than is done by compelling him to prove his infancy the second time in answer to a replication of a new promise, as the practice universally requires, because the personal incapacity to contract, on which the infant grounds his defenses lies so peculiarly within his own knowledge. (1 *Phillips on Evidence*, 199. *Berthwick v. Carruthers*, 1 *T. R.* 648. *Bigelow v. Grannis*, 4 *Hill's [N. Y.] R.* 206. *Bay v. Gunn*, 1 *Denio's R.* 108.)

The language of some cases, that the "tradesman is bound to inquire into the infant's circumstances or he trusts him at his peril," means nothing more than that the tradesman runs the risk of being able to prove the articles necessary at the trial. (*Steedman v. Rose*, 41 *Eng. C. L. R.* 232.) The making such inquiry, therefore, has no necessary bearing on the real point at issue, and is never necessary to be proved, and wholly unnecessary to be made before trusting the infant, except as a matter of satisfaction and safety of the tradesman. (*Brashaw v. Eaton*, 35 *Eng. C. L. R.* 99.)

If any part of the articles furnished the infant is proved to be necessary, the plaintiff may recover *pro tanto*. (*Burt v. Manning*, 10 *Vt. R.* 225. *Maddox v. Miller*, 1 *Maule & Selwyn's R.* 738. *Tuberville v. Whitehouse*, 12 *Price's*, 692.) The positions taken in this and the last preceding section are substantially those which are found in the American notes to Mr. Bingham's work on infancy, where the references are also mostly to be found. (*Bing. on Inf.* 87, note 1, sub. 6.) From the rules laid down and the illustrations

given it will not be difficult to determine on which party the burden of proof in all these cases lies.

§ 76. Upon this subject of necessities, then, it must always appear that the things furnished were actually necessary, of reasonable prices, and suitable to the infant's situation, condition and estate; that in no case is the infant bound by the specific agreement to pay for necessities, but the question is always open to show what the articles were actually worth; that the credit must be actually given to the infant and to no one else, and that no actual promise to pay for necessities is required, but if it appear that the articles furnished were necessities a promise to pay for them will be implied. That an infant may bind his parents to pay for necessities furnished him by others when he has an authority to do so, expressed or implied; but whether he can do so without such authority is still somewhat in doubt; though the English rule would seem to be tolerably well settled, that the father's liability rests wholly upon the ground of agency; and this rule is declared to be law in several of the states, with the indications that it will ultimately be adopted in all of the American States. That the term "necessaries" embraces the necessary meat, drink, apparel, medical treatment, and the like, and proper teaching or instruction of the infant, including necessary articles for the support of his wife and children. That the wants to be supplied must be personal; either those for the body, as food, clothing and lodging, or those necessary for the proper cultivation of the mind, as instructions suitable and requisite to the useful development of the intellectual powers, and qualifying the individual to engage in business when he shall arrive at the age of manhood. That the term necessities does not embrace goods purchased by the infant to trade with, because the law does not deem him competent to carry on such business. That it is always a question of law for the court, whether articles for which an infant is sued are within the class of necessities, and the jury are to pass upon their adaptation to the condition and wants of the infant; and that the rules of evidence in these cases are the same as in cases of adults. It may also be added that, in an action against an infant for necessities, he may interpose the same matters of defense as adults can in similar cases. (*Francis v. Felmet*, 4 Dev. & Batt. R. 496.)

The interesting views of Professor Parsons upon this subject, as gathered from the authorities, may be profitably consulted, together

with the references which he makes. (*Vide Parsons on Contracts*, 244–257, and the notes and references.)

When the contract is for necessities, an infant may take the case out of the statute of limitations by an acknowledgment that the debt was for necessities. (*Willins v. Smith*, 82 *Eng. C. L. R.* 179.)

CHAPTER VIII.

OF WHAT INFANTS ARE CAPABLE — WHAT IS BINDING ON THEM BESIDES THEIR CONTRACTS FOR NECESSARIES — OFFICES — MARRIAGE OF INFANTS — HOMAGE — WILLS OF PERSONALTY — FINES AND USES — MARRIAGE SETTLEMENTS.

§ 77. SAID Lord Mansfield: “Miserable, indeed, must the condition of minors be; excluded from the society and commerce of the world; deprived of necessities, education, employment and many advantages; if they could do *no* binding acts. Great inconvenience must arise to *others* if they were *bound* by no act. The law, therefore, at the same time that it protects their imbecility from injury through their own imprudence, enables them to do binding acts for their own benefit, and, without prejudice to themselves, for the benefit of others.” (*Cecil v. Salsbury*, 2 *Vern. Ch. R.* 224.) We have already seen that an infant, under certain circumstances, may bind himself absolutely for necessities, and that he may be sued and charged in execution in all such cases, the same as an adult. An infant has a capacity to do many other binding acts which are as valid in law as though done by an adult.

§ 78. An infant is capable of holding and discharging the duties of all such offices as do not concern the administration of justice, but only require skill and diligence; and these he may either exercise himself when of the age of discretion, or they may be exercised by deputy. In England it has been held that he may properly hold the offices of park-keeper, forester and jailer; and the statute extends to an infant jailer, so as to charge him in an action of debt for an escape of one in execution. (*Shrewsbury's case*, 9 *Coke's R.* 48. *Sir George Reynold's case*, *Ib.* 97. *King v. Dilliston*, 2 *Mod. R.* 222.)

It is laid down, as a general proposition of the common law, that a mere ministerial office may be granted to an infant in pos-

session or reversion, for he may exercise it by deputy. (*Auditor Curle's case*, 11 *Co. R.* 4 a.)

An infant may be deputed by the sheriff to serve a particular writ, and his acts while in the discharge of that duty will be as binding as though done by the sheriff himself. (*Barrett v. Seward*, 22 *Vt. R.* 176.)

It has been held, in the State of Ohio, that an infant may execute a mere power. (*Sheldon v. Newton*, 5 *Ohio R.* 494.) The same doctrine has been laid down in the State of Mississippi. (*Thompson v. Lyon*, 20 *Miss. R.* 155.) And in the State of Missouri it has been held that an infant may be authorized to exercise the power of appointment by the instrument creating the power, but that he cannot exercise such power if it is coupled with an interest. (*Schneider v. Staike*, 20 *Mo. R.* 269.)

An infant who purchases land for another, takes a deed in his own name, and then immediately conveys to the proper person, cannot repudiate the deed on the ground that an infant may execute a power as absolutely and irrevocably as an adult. (*Sheldon v. Newton*, 3 *Ohio N. S. R.* 494.) But an infant cannot be authorized to execute *mesne* process by the magistrate issuing it. (*Harvey v. Hall*, 22 *Vt. R.* 211.)

An infant may act as the attorney or agent of another, for it is not necessary that a person be *sui juris*, or capable of acting in his own right, in order to qualify him to act for others; though, as a general thing, an infant will not be admitted to act as an attorney to appear and prosecute or defend actions, or represent the persons of others in courts of justice. This is prohibited by the constitution and laws of most of the states. We have seen that an infant may be the mayor of a city, and that his acts as such mayor cannot be avoided by reason of his nonage. (*Ante*, § 5.) So an infant may execute a deputation to a seneschal or steward of his manor, for the reason that it would be to his benefit to be permitted to do so. (*Halliburton v. Leslie*, 2 *Hogan's R.* 252. *Vide, also, Edlestone v. Collins*, 13 *Eng. L. & Eq. R.* 331. *S. C.* 17 *ib.* 295.)

§ 79. An infant may hold and own property, both real and personal; and this right is as clear and well protected as that of a person who has arrived at full age. (*McCloskey v. Cyphert*, 27 *Penn. S. R.* 220.)

A minor, who is allowed to go and make contracts for himself without interference, though there may have been no formal eman-

cipation by the father, may acquire property and bring actions concerning such property. (*Bookier v. Bolivar*, 39 *Maine R.* 406.) And a minor who has been emancipated by his father may hire a farm and then take his father and support him on the farm, and notwithstanding hold the crops raised as his own property. (*McCloskey v. Cyphert*, 27 *Penn. S. R.* 220.) And if a father give his infant child an article of dress or ornament; he cannot afterward reclaim it without the infant's consent. (*Smith v. Smith*, 32 *Eng. C. L. R.* 677.)

An infant is capable of inheriting for the reason that in law he may hold property. If an infant be lord of a manor, he may grant copyholds, notwithstanding his nonage, for these estates do not take their perfection from the interest or ability of the lord to grant, but from the custom of the manor by which they have been demised and are demisable, time out of mind. (*Bac. Ab. tit. Infancy, F.* 127.) So also in England an infant may present to a church, and it is said that this must be done by himself, of whatsoever age he be, and cannot be done by his guardian, for the guardian can make no advantage thereof, and consequently has nothing therein whereof he can give an account, and therefore the infant himself must present. (*Bac. Ab. tit. Infancy, F.* 127.) We have no copyholds or advowsons or church presentations in the United States, so that these rights, as appertaining to infants, have no application here; and yet the matter is regarded of sufficient importance to refer to it. Cases may possibly arise where the same principles are involved.

§ 80. By the common law an infant may be an executor at the age of seventeen, and his acts as such will bind him unless they amount to a *devastavit*. If an infant, under the age of seventeen, be appointed executor, and administration "*durante minore ætate*" be granted another, such administration ceased at common law when the infant arrived at the age of seventeen. (*Pigott's case*, 5 *Coke's R.* 29.) And when an infant is appointed executor, *administratio durante* may be committed to the mother or another friend of the infant, which will cease and be void when the infant is of the age of seventeen years. (*Prince's case*, 5 *Coke's R.* 30.)

But the age of competency for the office of executor or administrator is fixed by statute in many of the American States at twenty-one. Thus, in the State of New York it is declared by statute that no person shall be deemed competent to serve as an executor who,

at the time the will is proved, shall be under the age of twenty-one years. (2 *R. S.* 69, § 3. 2 *Stat. at Large*, 71.)

By the Revised Statutes of Vermont, if an infant is named executor, administration, with the will annexed, will be granted during his minority unless there shall be another executor who shall accept the trust and give bond, and the minor on arriving at full age may be admitted as joint executor. (1 *R. S. ch.* 46, § 6.) Such also is the law in the State of Massachusetts (*Gen. Stat. ch.* 93, § 7), and the same in the State of Maine (*R. S. ch.* 64, § 15), and the same in Rhode Island (*R. S. ch.* 156, § 3), and the same in Pennsylvania (*Purdon's Digest of 1849, ch.* 425, § 23) and in Ohio (1 *R. S. ch.* 43, § 8), and the same in the new State of Nebraska (*R. S. ch.* 14, § 168).

In the State of Missouri the law upon the subject is the same as in New York (*Gen. Stat. ch.* 120, § 5); and the law is the same in Texas (*Oldham & White's Digest, art.* 706); and the same in the State of Oregon (*Gen. Laws 1864, ch.* 15, § 1075).

In the State of New Jersey executors are required to give bonds for the faithful performance of their trust; and as infants are not in general bound by their bonds, probably none but adults can act as executors. (*Elmer's Digest, 1855, p.* 22, § 1.) The same would seem to be the law in Virginia (*Code of 1849, ch.* 130, § 1. *Munroe v. Jones, 4 Munf. R.* 194); and the same in North Carolina (*Revised Code, ch.* 46, § 4); and also in the State of Louisiana (*Rev. Stat. of 1856. p.* 3, § 5).

In the State of Maryland it is provided by statute that if the executor named in any will shall be under eighteen years of age, letters testamentary shall be granted and issued in the same manner as though none had been named. (1 *Code, art.* 93, § 52.) And it is further provided that the bonds of an executor over eighteen years of age shall be binding in all cases and upon all parties. (*Ib.* § 59.)

In Illinois persons at the age of seventeen may act as executors, though a discreet person must be appointed when the executor is under twenty-one, to manage and control the trust until such executor shall become of age. (*Gen. Stat. p.* 1185, § 23.)

In the State of Mississippi the statute expressly provides that minors, at the age of eighteen, may be appointed and act as executors. (*Rev. Code, ch.* 60, *art.* 51.)

In those States where the subject is not governed by statute, the qualifications of executors, of course, will be the same as at

common law. In the State of New York it has been held that an infant executor, who should happen to be appointed, though irregularly, will be responsible for all acts done after coming of age and before revocation; but that he will not be compelled to account for any assets coming to his hands during infancy. (*Carver v. Mowatt*, 2 *Edw. Ch. R.* 57). But in the State of Vermont it has been held that an infant executor is responsible for a fraudulent execution of his trust. (*Loof v. Loof*, 1 *Vt. R.* 177.)

§ 81. Unless there is some statutory restriction, males at the age of fourteen and females at the age of twelve are capable of contracting and consummating marriage; those periods respectively being the age of consent to a marriage, as fixed by the common law. Contracts of marriage between infants, when both are of the age of consent, if *executed*, are as binding as if made by adults; but if either party is under that age *both* have the privilege of avoiding; a principle, as has been well said, not found in any other contracts of infants. (1 *Parsons on Con.* 278.) Infants under the age of consent sometimes marry; and when they do and agree to the marriage when they attain those ages the marriage is good; but at common law they cannot disagree before the age of consent, and both must be bound by the marriage or neither. (*Co. Litt.* 79 b.) If the parties marry within the age of consent and the wife have a child begotten after the marriage solemnized *infra annos nubiles*, and they are afterward divorced by reason of such premature solemnization of marriage, the child will be regarded as a bastard. (*Kenn's case*, 7 *Coke's R.* 42.) If after the age of consent the parties disagree by parol, and subsequently agree and live together as husband and wife the disagreement is not binding, for they may properly cohabit together without any new marriage, and the agreement to do so after the age of consent is a ratification of the marriage. So if a man within the age of fourteen takes a wife of full age and after brings a writ "*de muliere abducta cum bonis viri*;" that is, liberally rendered, "concerning a woman taken away with her husband's goods," and continues the action after fourteen, this is held and considered to be an agreement to the marriage, so that it cannot afterward be defeated. (*Bing. on Inf.* 75.) But though it is held that the party above age may as well disagree as the other, yet he cannot do it before the other arrives at the proper age; at least such is the rule at the common law. It has also been held that if a man marries a wife within the age of consent and the

woman at the age of eleven years disagrees to the marriage, and the husband takes another wife and has issue by her, this issue is a bastard; the first marriage continuing notwithstanding the disagreement of the woman; for her disagreement within the age of twelve years is void. (*Bing. on Inf.* 76.) It is doubtful, however, whether this doctrine would be recognized as sound in this country or even in England at the present day. (*Parsons on Con.* 564.) It has also been adjudged that if the same woman after the age of twelve years had married another, the first marriage would have been thereby absolutely dissolved, so that the husband might take another wife. (*Bing. on Inf.* 76.) The better opinion now is that parties marrying before the age of consent may dissent to the marriage within nonage, and thus avoid it *in toto*.

§ 82. The consent of parents or guardians to the marriage of minors is required by the marriage acts of England and by the statutes of several of the American States. By the English statute such marriage of minors without such consent is declared to be absolutely void. (26 *Geo. II, ch.* 33.)

In the State of New York the age of consent to marriage was formerly fixed at seventeen in males and fourteen in females, but the provision was soon repealed, and the common law rule now prevails in that State. Should a marriage be solemnized between parties within the age of consent, the marriage is declared to be void from the time its nullity shall be declared by a court of competent authority; and in no case will the marriage be annulled on the application of a party who was of legal age at the time it was contracted, nor when it shall appear that the parties, after they had attained the age of consent, had for any time freely cohabited as husband and wife. (2 *R. S. part 2, ch.* 8, *tit.* 1, §§ 4, 21. 2 *Stat. at Large*, 144, 148.) If the female is under twelve years of age at the time of her marriage, and subsequently dissents, the court of chancery in one case enjoined the husband from all intercourse with her. (*Ayman v. Roff*, 3 *Johns. Ch. R.* 49.)

In the State of Maine, males under the age of twenty-one and females under the age of eighteen are forbidden to be married without the consent of their parents or guardians. (*R. S. ch.* 59, § 6.) They have a similar provision in the State of Massachusetts. (*Gen. Stat. ch.* 106, § 9.)

In the State of Vermont, when the male is under twenty-one or the female under eighteen, the solemnization of the marriage is

expressly forbidden, except the parent or guardian of the minor, if there be any in the State competent to act, shall be present and assent to it, or give consent thereto in writing. (*R. S.* 1863, *ch.* 69, § 8.) The law of New Jersey on the subject is similar to that in the State of Maine. (*Elmer's Digest*, 1855, *p.* 464, § 3.) In the State of Pennsylvania all persons, both male and female, wishing to join in marriage before they attain to the age of twenty-one, must obtain the consent of their parents or guardians to such marriage. (*Purdon's Digest*, 1849, *ch.* 41, § 1.)

In the State of Ohio the age of consent to marry is raised to eighteen in males, and fourteen in females, and even then they must obtain the consent of their parents or guardians if they wish to marry before they arrive at full age. (1 *R. S. ch.* 71, § 10.)

By the statute of Indiana, the age of consent to marry is fixed at seventeen for males, and fourteen for females, but the consent of parents or guardians is necessary for the marriage of infants. (1 *R. S.* 1862, *ch.* 95, § 5.)

The law of Illinois upon the subject is the same as of Indiana. (*Gen. Stat.* 1858, *p.* 579, § 1.)

In the State of Wisconsin males may consummate the marriage contract at eighteen, and females at fifteen, although the consent of parents or guardians of infants is requisite. (*R. S. ch.* 109.)

In the State of Michigan males may marry at eighteen, and females at sixteen. (2 *Comp. Laws*, 1857, *ch.* 107, § 1.) Under the statute of Michigan, when parties are married, one of whom is over and the other under the age of consent, the former is bound by the marriage, unless they separate by consent before the other reaches lawful age, and do not cohabit afterward, or unless the other refuse consent on arriving at that age. And a second marriage by the former, in the absence of such mutual separation, or such refusal to consent, is bigamy. (*People v. Slack*, *Am. Law Reg. N. S.* 318. *S. C.* 15 *Mich. R.* 193.)

In the State of Iowa the age of consent for males is sixteen, and for females fourteen, and in all cases where the party is an infant, the consent of the parents or guardian is necessary. (*Rev. Laws*, 1860, *ch.* 102, §§ 2515, 2521.)

In the State of Minnesota the law upon the subject is the same as in Wisconsin. (*Laws of* 1848, *ch.* 52, §§ 2, 7.)

In the State of Missouri the age of consent is fixed for males at twenty-one, and for females at eighteen, though they may marry

under those ages respectively by and with the consent of their parents or guardians. (*Gen. Stat. ch. 113, § 5.*)

In Nebraska males may marry at the age of eighteen, and females at the age of sixteen. (*R. S. ch. 34, § 2.*)

In Oregon the same period is fixed for males, and fifteen for females. (*Gen. Laws, 1864, Civil Code, ch. 31, § 1.*)

In the State of Texas it is declared by statute that males under fourteen, and females under twelve, shall not marry, being simply the re-enactment of the common law upon the subject. (*Oldham & White's Digest, art. 2440.*)

In the State of Virginia the law is the same as in Texas. (*Code of 1849, title 31. ch. 109, § 3.*)

In Maryland the right to marry is unqualified as to the age of consent, except that the statute imposes a fine upon any minister or other person authorized to perform the marriage ceremony, who shall knowingly join in matrimony any male under twenty-one, or female under the age of sixteen, without the consent of the parents or guardian of such male or female. (*1 Code, art. 93, § 52.*)

In North Carolina the age of consent is fixed for males at sixteen, and for females at fourteen. (*Rev. Code, ch. 68, § 14.*) And in the State of Mississippi the law upon the subject is the same as in the State of Maine. (*Rev. Code, 1857, ch. 40, art. 6.*)

In all or nearly all of the remaining states the age of consent is the same as that established by the common law.

§ 83. It has been observed that by the law of England, the marriage of minors without the consent of their parents or guardians, is absolutely void, unless the statute is thus explicit and pointed. The marriage without such consent would probably be valid, although the person celebrating the nuptials might be punished for a violation of law. Indeed, this view has been sustained by express adjudication in the State of Massachusetts, in a case in which it appeared that a female infant of the age of thirteen years was married to an adult male, without the knowledge or consent of her parent and guardian. The court, after referring to the common law rule, fixing the age of consent in females at twelve, and fourteen in males, proceeds: "Contracts of marriage between infants, being both of the age of consent, if executed, are as binding as if made by adults. (*Co. Litt. 79 b. Reeve's Dom. Rel. 236, 237. 20 Am. Jurisp. 275. 2 Kent's Com. [6th ed.] 78. Pool v. Pratt, 1 Chip. R. 254. The Governor v. Rector, 10*

Humph. R. 61.) This rule, originally ingrafted into the common from the civil law (1 *Bl. Com.* 436; *McP. on Inf.* 168, 169), is undoubtedly an exception to the general principles regulating the contracts of infants; and might, at first, seem to disregard the protection and restraint with which the law seeks to surround and guard the inexperience and imprudence of infancy. But in regulating the intercourse of the sexes, by giving its highest sanctions to the contract of marriage, and rendering it, as far as possible, inviolable, the law looks beyond the welfare of the individual and a class, to the general interests of society; and seeks, in the exercise of a wise and sound policy, to chasten and refine this intercourse, and to guard against the manifold evils which would result from illicit cohabitation. With this view, in order to prevent fraudulent marriages, seduction and illegitimacy, the common law has fixed that period in life when the sexual passions are usually first developed as the one when infants are deemed to be of the age of consent and capable of entering into the contract of marriage. But it is urged that this rule of law is not in force in this commonwealth, because, by our statute, ministers of the gospel and magistrates have always been prohibited, under a heavy penalty, from solemnizing marriages of males under twenty-one years of age, and of females under eighteen years of age, without the consent of their parents or guardians. (*Stat. 7 Wm. Anc. Chart.* 285. *Stat.* 1786, *ch.* 3, §§ 3, 5. *Ib.* 1834, *ch.* 177, §§ 2, 4. *R. S. ch.* 75, §§ 15, 19. *Stat.* 1853, *ch.* 335, § 1.) But the effect of these and similar statutes is not to render such marriages, when duly solemnized, void; although the statute provisions have not been complied with. They are intended as directory only upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages when prescribed conditions and formalities have not been fulfilled. But in the absence of any provision declaring marriages not celebrated in a prescribed manner, as between parties of certain ages, absolutely void, it is held that all marriages, regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute. (2 *Kent's Com.* 90, 91. 2 *Greenl. Ev.* § 460. *Milford v. Worcester*, 7 *Mass. R.* 48. *Londonderry v. Chester*, 2 *N. H. R.* 268. *Hantz v. Sealy*, 6 *Binn. R.* 405.)" (*Parton v. Hervey*, 1 *Gray's R.* 119.) This elaborate and lucid opinion of the court is not only interesting as settling the law of the case, but as giving the

reasons why an executed contract of an infant is binding, while most others of his contracts may be avoided.

The law, generally speaking, recognizes any marriage which is valid in the country in which it is celebrated, though contrary to the law of the place where the parties may subsequently reside. (*Dalrymple v. Dalrymple*, 2 Hagg. Cons. R. 54. *Ex parte Hall*, 1 Vesey & Beame's R. 111.) But a marriage in one state in violation of the laws of another will not have the effect to emancipate the minor party to such marriage in the latter state. (*Babier v. Le Blanc*, 12 La. An. R. 367. *Vide, also, Clement v. Wafer*, Ib. 599.) In England, a marriage was pronounced null on the ground of force and custody, having been celebrated between a girl aged only twelve years and a half and one of her testamentary guardians, who had taken her from school and carried her abroad for the purpose without any constraint. (*Harford v. Morris*, 2 Hagg. Cons. R. 423.)

§ 84. The age of consent for minors who are illegitimate is the same as for those born in lawful wedlock, and all of the rules applicable are the same in both cases.

Mr. McPherson, in his work on infants, has an interesting chapter upon the subject of marriage of infants, but the most of it is occupied with a statement of the law as established by the statutes of England, and which has little or no application to the subject in this country. The substance of what he says of a general application is the following: The age of consent to marriage is fourteen in males and twelve in females. If a boy under fourteen, or a girl under twelve, years of age marries, this marriage is only inchoate and imperfect; and if either party be under seven years of age it is absolutely void. When the marriage is inchoate, when either of the parties comes to the age of consent they may disagree and declare the marriage void, without any divorce or sentence of court. This is founded on the civil law. But the canon law pays a greater regard to the constitution than to the age of the parties, for if they are *habiles ad matrimonium*—fit for marriage, it is a good marriage, whatever their age may be; and by the common law, it is so far a marriage that if, at the age of consent, they agree to continue together, they need not be married again. This is the rule, as a general thing, in most of the American States, and in some of them the marriage is considered valid until it is dissolved by the decree of a competent court. If the husband be of years of

discretion and the wife under twelve, when she comes to years of discretion he may disagree as well as she may; and so it is *vice versa* when the wife is of years of discretion and the husband under; the contract being of such a nature as necessarily to imply a right to dissent at the age when the reason is capable of being exercised. By the common law, if the parties themselves are of the age of consent, no other concurrence was necessary to make the marriage valid; and this was agreeable to the canon law, although, both by that and by the civil law, the consent of parents was requisite for a perfectly regular and solemn marriage. (*McPherson on Infants*, 168.)

§ 85. By the old feudal law of England a minor could do homage, which was the submission and service which was usually promised by the vassal or tenant to his lord or superior upon being admitted to the possession of the land which he held in fee, or the ceremony performed in making the submission by the tenant on being invested with the fee. The ceremony was performed by the tenant openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sat before him, and then professed that "he did become his man, from that day forth, of life and limb and earthly honor," and then received a kiss from his lord." (2 *Black. Com.* 53.) This homage was properly an incident to tenure by knight's service only, and of course has never obtained in this country. In England, however, it was regarded of considerable importance, and while it continued it was not a mere ceremony; for the performance of homage, when it was due, materially concerned both lord and tenant in point of interest and advantage. To the lord it was of consequence because, till he had received homage from the heir, he was not entitled to the wardship of him and of his land, unless the lord had the seigniorship or manor for life or years only, in which case he could not take homage, and therefore was allowed wardship without the previous acts. To the tenants the homage was scarce of less importance, for anciently every kind of homage, when received, but not before, bound the lord to keep the tenant from every molestation for services due to the lord paramount, and to defend his title to the land against all others. (2 *Black. Com.* note 9.) This was the prefeffion and promise which a minor had the power to make, under the feudal law, which formerly prevailed in England, and the influence of which upon her landed estates is not lost at the present day.

§ 86. We have seen that males at fourteen, and females at twelve, may, at common law, make a valid testament of personal property, although the age of competency is generally fixed by statute, the provisions of which in the several states have been hereinbefore given. (*Ante*, § 7.) It has been considered not quite certain as to what is the common rule upon this subject, although the weight of opinion is in accordance with the age above given. Lork Coke stated the age to be eighteen, while other writers mention seventeen to be the age, because that is the age at which an administration, during the minority of an executor, determines. According to others, fifteen is the age for males, if the party can be proved of sufficient discretion; but this opinion seems to have been based upon nothing more than some loose dictum to be found in an early report, and has never commanded any particular respect. (*Bing. on Inf.* 77.) By the Roman law the testamentary power was recognized in males at fourteen, and in females at twelve, and, until the matter was fixed by statute, the civilians agreed that the English ecclesiastical courts followed the same rule. Mr. Bingham concludes what he has to say upon this point, by asserting that on the one hand the rule of the ecclesiastical courts, in holding twelve and fourteen to be the ages at which males and females, according to the difference of sex, first have the power of making wills of personalty, seems now well established; so, on the other hand, that it is in some degree consonant to the doctrine of the English common law, for though that it is silent as to the age for wills of personalty, these being the subject of a different law, yet it adopts the same standard of twelve and fourteen for other purposes, and so far deems them the ages of discretion as to give infants of those ages the power of choosing guardians, and to presume that they are, *doli capaces*—capable of mischief, in respect to crimes. (*Bing. on Inf.* 79.)

In a case in the Supreme Judicial Court of Massachusetts, in which the will of a male infant was involved, Parker, Ch. J., in delivering the opinion, said: "That an infant of fourteen years and upward is capable of disposing of his personal estate by will, seems to be well settled at common law." (*Deane v. Littlefield*, 1 *Pick. R.* 239, 243.)

§ 87. In England, if an infant levies a fine, he is enabled to declare the uses thereof, and if he does not reverse the fine during his nonage, the declaration of uses will stand good forever; for though

that be *in pais*, and all such acts an infant may avoid at any time after his full age, if he do not consent, yet being made in pursuance of the fine levied, which fine must stand good forever, unless reversed, so will the declaration of uses also stand. (*Bing. on Inf.* 80.) But the sealing of advantageous marriage articles by an infant jointly with his father, is not sufficient to declare the uses of a fine and recovery which he suffers after age, jointly with his father. (*Bing. on Inf.* 80.) Alienation, by matter of record, as by fines and recoveries, occupies a prominent place in the English Code, but the practice is very little known in this country. This rule respecting infants, therefore, is not very important with us, except in those states where the doctrine of uses still exists as a modification of the common law; and even in England, fines and recoveries are now swept away by statute, so that the rule will soon cease to be of particular interest there. (*3 and 4 Wm. IV, ch. 74.*)

§ 88. The question, whether an infant was barred by a jointure made before marriage, was for a long time unsettled in England. In consequence of the capacity of infants to contract marriage their marriage settlements, when reasonable, were held valid in chancery; but it was unsettled whether a female infant could bind her real estate by a settlement upon marriage, even after the enactment of the statute of 27 *Hen. VIII*, introducing jointures, until the decision of a celebrated case in the House of Lords, when the great question was finally settled in favor of the capacity of the female infant to bar herself of her right of dower in her husband's land, and to her distributive share of her husband's personal estate, by her contract before marriage. (*Drury v. Drury, given in 2 Edw. Ch. R.* 60.) And in another case in chancery, decided before *Drury v. Drury*, Lord Chancellor Hardwicke laid down a similar rule, saying that marriage agreements differ from all other agreements of infants. "The principal contract is the marriage, and an infant female may contract at the age of twelve. All other parts of the contract are collateral incidents, entered into to secure some provisions for the party marrying and the issue, and may be greater or less, according to circumstances. As soon as the marriage takes place, the principal contract is executed, cannot be set aside or rescinded;" therefore the court will take care how they "break in upon settlements made upon the marriage of infants." And further on, his lordship says: "But if this court should interpose to set aside or give relief against any part of a marriage settlement,

it must relieve against and avoid the whole, for every part makes the consideration of the whole of everything; and it is impossible, where there is no fraud, to say this fact is unreasonable; you have gained too much on one side, and therefore that shall be deducted. This makes it a different bargain, and, in consequence, the uses of the estate must be broken in upon on the other side." (*Harvey v. Ashley*, 3 *Atk. R.* 607, published in 8 *Wend. R.* 331.) And in still another case, Lord Ryder represents Lord Chancellor Hardwicke as saying, "it was clear in law that if a man married, and before marriage, in consideration of it and of her portion, makes a jointure on his wife, though she was an infant, she cannot waive her jointure and set up her dower." (*Price v. Seys*, *Barnard's Ch. Ca.* 117, cited in *Drury v. Drury*, and published in 8 *Wend. R.* 331.) These cases left open the question, whether an infant female could bind her own *real* estate by a marriage settlement, and Lord Eldon, in a subsequent case, held that a female infant cannot bind her real estate by a settlement on marriage so but that she may disaffirm it; and in a recent case it was expressly held that no valid settlement of a female infant's real estate could be made upon her marriage, by virtue of any agreement by her or her parents or guardian, or by the authority of the court. (*Field v. Moore*, 35 *Eng. L. & Eq. R.* 498. *Vide, also, Milner v. Lord Harwood*, 18 *Vesey's R.* 259.) And such is now the well settled law in England.

Other decisions have been considered as favorable to the power of *male* infants to settle their real estate upon marriage, and Mr. Atherly advances the same opinion. (*Atherly on Marriage Settlements*, 42-45.) Chancellor Kent, however, thinks this conclusion questionable in the light of the decision of Lord Eldon, in *Milner v. Lord Harwood*, and submits the very pertinent question, "If a female infant cannot settle her real estate without leaving with her the option, when twenty-one, to revoke it, why should not the male infant have the same option?" (2 *Kent's Com.* 258.) The doctrine now held in England upon the subject seems to be established in New York, Pennsylvania, Virginia, and perhaps others of the American States. (*Temple v. Hawley*, 1 *Sandf. Ch. R.* 153. *Shaw v. Boyd*, 5 *Serg. & Rawle's R.* 312. *Wilson v. McCullouch*, 7 *Harris' R.* 77. *Lee v. Stewart*, *Leigh's R.* 76.) The settlement, however, would pass the estate of the infant, and would be valid until avoided. A female infant can affirm such settlement during her coverture, and she may disaffirm it after she attains her major-

ity if she is then a widow. It is a vexed question whether she can avoid it during coverture. (*Temple v. Hawley*, 1 *Sandf. Ch. R.* 153.)

In one case, in the State of Virginia, the point was settled that "infants may contract by marriage articles or settlements before marriage, and such contracts will bind them when of full age." (*Treble v. Archer*, 3 *Hen. & Munf. R.* 399.) And in a still later case the court of appeals of that state re-affirmed the doctrine, saying that "the court perceive nothing to disapprove in the case." (*Healey v. Rowen*, 5 *Grattan's R.* 414.) The settlement may either be of the wife's fortune, or of some proper equivalent; and if it is a settlement of the husband's estate, the matter will require evidence of the sufficiency of the title and of the nature of the estate. (*McPherson on Inf.* 558.)

§ 89. In many of the American States the subject of jointure is regulated by express statute. Thus, in the State of New York a conveyance of lands for the purpose of creating a jointure for an intended wife, in order to bar her claim or right of dower in the lands of her husband, must be made with the assent of the wife evidenced, if she be of full age, by her becoming a party to the conveyance; or, if she be an infant, by her joining with her father or guardian in such conveyance. (1 *R. S. part 2, ch. 1, tit. 3*, §§ 9, 10, 11. 1 *Stat. at Large*, 692.) Previous to the statute a competent and certain provision settled upon the female infant before marriage, by way of jointure, to which there was no other objection but its mere equitable quality was an equitable bar of dower. But the statute has done away with the distinction between legal and equitable jointures; and any estate or pecuniary provision made for the benefit of the wife in that state, whether an adult or an infant, in lieu of dower, will, if assented to by her in the manner prescribed by statute, constitute a legal bar of her dower. (*McCarter v. Teller*, 2 *Paige's R.* 511. *S. C.* 8 *Wend. R.* 267.) And the "act for the more effectual protection of the property of married women," passed in 1849, expressly declares that "all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place." (*Laws* 1849, *ch.* 375, § 3.) This provision would seem to render valid and effectual all contracts and conveyances made in consideration of marriage, both of infants and adults, and in relation to real as well as personal estate. (*Vide Wetmore v. Kissam*, 3 *Bosworth's R.* 321.)

§ 90. A male infant may undoubtedly bar himself by agreement before marriage, either of his estate by the curtesy or of his right to his wife's personal property. He may consent to a settlement made by his wife of her own land, and should he, by settlement on the marriage, covenant that her estate should be settled to certain uses, or should he assent to such covenant on the part of his wife, who is an adult at the time of her marriage, he will be bound by the covenant. (*Slocombe v. Glubb*, 2 Bro. Ch. R. 545. 2 Kent Com. 258.) It is thought that *personal* property may unquestionably be bound by such settlements on the part of both male and female. (*Ib. and Harvey v. Ashley*, 3 Atk. R. 613.)

All marriage settlements, in order to be binding upon a female infant especially, must be fair and reasonable, and not tend to deprive her of every thing. (*Williams v. Williams*, 1 Bro. Ch. R. 152. *Vide also Durnford v. Lane*, *Ib.* 106. *Caruthers v. Caruthers*, 4 *ib.* 500.) But the infant wife will be bound by the marriage contract if she accept of him money, or if after her husband's death she accepts of a jointure under the statute. (*Smith v. Low*, 1 Atk. R. 489.) And in Virginia it has been held that infants may contract by marriage articles or settlements, and that such contracts will bind them when of full age; provided that the settlement be made through the father or guardian of the infant. The court held further that the law had intrusted the father or guardian with the marriage of infant children or wards, and this doctrine may affect the rule of marriage settlements somewhat in that State. (*Tabb v. Archer*, 3 Hen. & Munf. R. 400.)

An objection to the validity of a marriage settlement, on the ground that the parties to it are infants, can only be made by the parties themselves. At most, it is only voidable, and unless the parties, within a reasonable time after coming of age, seek to avoid it, they will be considered as ratifying it. (*Jones v. Butler*, 30 Barb. R. 641.)

§ 91. Questions frequently arise, especially in England, respecting settlements on the marriage of wards of court, though such questions have usually arisen in the case of female wards; and Mr. McPherson considers it almost impossible to deduce from the decided cases any general conclusions as to what the court may in any particular instance hold to be a proper settlement. (*McP. on Inf.* 201.) It seems, however, that settlements made under the sanction of the court take effect, like other marriage settlements of

infants, only as contracts of the adult party, and that their provisions do not derive from the approval of the court any authority or force which does not belong to them by the general rules of law. (*McP. on Inf.* 202.)

Upon the marriage of two infants, one being a ward of court, the court has no power to compel a settlement to be made by either of them during minority, not even of the personal estate of the infant ward. (*Field v. More*, 35 *Eng. L. & Eq. R.* 498.)

When a female ward of court marries a man who has property of his own to settle, the court, whether there has been contempt or not, will not allow the wife's fortune to be tied up for the children of that marriage, but will take care to enable her to provide for a future marriage; and it is not sufficient, it seems, that the settlement should contain powers for the wife to provide for a second husband and children out of her real estate, because she may lose her husband and marry again before she attains full age, and she cannot execute powers over her real estate during infancy. (*Wells v. Price*, 5 *Vesey's R.* 398. *Halsey v. Halsey*, 9 *ib.* 471. *Hearle v. Greenbank*, 1 *ib.* 298, cited in *McP. on Inf.* 202.) If a female ward of court is married without the consent of the court, the court will compel the husband, by process of contempt, to make a proper settlement; and in such cases, the interest which the husband will be allowed to take in the wife's property rests entirely in the discretion of the court. (*Stevens v. Savage*, 1 *Ves. Jr. R.* 154. *Ball v. Coutts*, 1 *Ves. & Beame's R.* 300, 303.)

In one case, where a female ward had been induced, at the age of sixteen, to go through a form of marriage with a person of low condition, which was afterward regularly solemnized, Lord Eldon, under the conviction that there could not be much expectation of happiness when the husband had nothing and the wife had the whole control over the property, directed a moderate settlement to the husband during coverture, and left the wife to control the balance of the property. (*Bathurst v. Murray*, 8 *Ves. R.* 74.) This same doctrine with respect to the marriage of wards of court, seems to be recognized to the fullest extent in the American States. In a case in the late court of chancery of the State of New York, the chancellor (Walworth) goes on to show that there is a class of cases in which the court may interfere in behalf of the wife or her children, and take from the husband, not only the property in action which he has acquired by the marriage, but also that which he has

reduced to possession, for the purpose of receiving a suitable provision for the wife herself, and also for the issue of the marriage. "But," he remarks, "there are cases where the husband has married a ward in chancery without the consent of those who by law are intrusted with the protection of her property and rights. In such cases, as the husband is guilty of contempt, and as the whole property of the infant *feme-covert* is under the special protection of the court, the court itself, even without the consent of the wife, may, upon the application of any of her friends in her behalf, restrain the husband and his creditors from intermeddling with her estate until a proper settlement is made for the benefit of the wife and the issue of the marriage." (*Van Duzer v. Van Duzer*, 6 *Paige's R.* 366, 369.)

A ward of chancery is a person who is under a guardian appointed by the court of chancery, or a court having equity powers. Judge Story says, "No person is permitted to marry a ward of court without the express sanction of the court, even with the consent of the guardian. If a man should marry a female ward without the consent and approbation of the court, he and all others concerned in aiding and abetting the act will be treated as guilty of a contempt of the court; and the husband himself, even though he were ignorant that she was a ward of the court, will still be deemed guilty of a contempt." (2 *Sto. Eq. Jur.* § 1358.)

§ 92. When an infant has no testamentary guardian, at common law he has the power at the age of fourteen to name his guardian to the court, and unless there appears to be some objection to the person named, he will be appointed. The competent age of the infant for choosing a guardian, however, is usually fixed by statute, and in most of the American States fourteen is the age fixed for males, and when there is a difference made between the age of the sexes in this respect it is of twelve in females. Infants, both male and female, may choose their guardians at the age of fourteen in the State of New York (2 *R. S. part 2, ch. 8, tit. 3, § 4*; 2 *Stat. at Large*, 157), and in the State of Massachusetts (*Gen. Stat. ch. 109, § 3*), Rhode Island (*R. S. 1857, ch. 138, § 4*), Indiana (2 *R. S. 1862, ch. 4.*), Michigan (2 *Comp. L. ch. 110*), Wisconsin (*R. S. ch. 112*), Nebraska (*R. S. ch. 22, § 3*), Oregon (*Gen. Laws 1864, ch 12, § 5*), Texas (*Oldham & White's Dig. arts. 951, 952*), and probably in many others. In Vermont it is provided that the father, if living, and if dead the mother remaining unmarried, shall be the guardian

of their minor children; and that the mother of illegitimates, while unmarried, shall be guardian of her minor children for all purposes until another shall be appointed. (*R. S.* 1863, *ch.* 72, §§ 2, 3.)

An infant father may generally appoint a guardian for his children by deed or by his last will and testament, though in England they have a statute which has taken away from an infant father, the power to appoint a testamentary guardian (1 *Vict. ch.* 26); and perhaps this statute has been copied into the laws of some of the American States. But the statutes of New York, New Jersey, Pennsylvania, Ohio, Alabama, and probably most of the other states of the Union, allow a father, being a minor, to appoint a testamentary guardian for his infant children, who will have all the powers of a guardian in common socage. (2 *Kent's Com.* 231, note b.) In the State of New York, however, no man can create any testamentary guardian for any children, unless the mother, if living, signify her assent thereto in writing. (*Laws* 1862, *ch.* 172 § 6.) In the State of Tennessee it is expressly provided by statute that a father under age may dispose of the custody of his children. (*Code of* 1858, § 2492.) In the State of Maryland the mother may appoint a guardian by will for her infant children. (1 *Code, art.* 93.)

CHAPTER IX.

OF INFANTS' CONTRACTS WHICH THE LAW REQUIRES — ENLISTMENTS IN THE ARMY AND NAVY — INDENTURES OF APPRENTICESHIP — EXECUTION OF TRUSTS.

§ 93. As a general rule, whatever an infant is bound to do by law, the same will bind him though he do it without a suit at law. For example, after an order of filiation an infant is bound by law to support his illegitimate child, and it is held in such a case that his promise to pay for necessities furnished to the child would be valid. The statutes of New York and of several others of the states, oblige the putative father of a bastard child to indemnify the city, town or county against the expenses of supporting such illegitimate child, and makes it necessary for him to enter into bonds, with sureties, for that purpose, as the only means by which he can obtain a discharge from arrest; and it is held that under

those statutes an infant putative father has a legal capacity to make a binding obligation in such a case. (*The People v. Moores*, 4 *Denio's R.* 518.) So, also, in the State of New York, an infant imprisoned on an execution in a civil suit, is entitled to a discharge from imprisonment on assigning his property in compliance with the provisions of the statute; and in such a case his assignment would be valid, notwithstanding his nonage, and could not be avoided. (*The People v. Mullin*, 25 *Wend. R.* 698.) And in a case in Massachusetts, Parsons, Ch. J., said, infants are bound by all acts which they are obliged by law to do. (*Baker v. Lovett*, 6 *Mass. R.* 80.) And in a still later case in the same state, the court held, that, inasmuch as the Massachusetts bastardy act requires that the party accused of being the father of a bastard child, shall give a bond, with sureties, infancy is no defense, either for the infant or his sureties, to an action on such bond. (*McCall v. Parker*, 13 *Metc. R.* 372.)

Lord Mansfield, over a hundred years ago, laid down the rule, that if an infant does a right act which he ought to do, which he was compellable to do, it will bind him; and said that "there is no occasion to enumerate instances; the authorities are express, and the reason decisive. Generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law." (*Zouch v. Parsons*, 3 *Burr. R.* 1801.)

A promissory note given by the putative father of an illegitimate child, in the State of Indiana, on a settlement with the mother, is valid, and cannot be defeated by the plea of infancy. (*Garvin v. Boston*, 8 *Ind. R.* 69.) All acts of necessity performed by an infant, whatever they be, are binding and cannot be avoided. (*Stephens' Nisi Prius*, 2049.)

§ 94. An infant is bound by any act which the court would require him to perform. If a father buy land, and take a deed for it in the name of his infant son, for the purpose of defrauding his creditors, and afterward sell the land to an innocent purchaser for a valuable consideration, and the infant, at the request of his father, convey the legal title to the purchaser, he cannot avoid the deed after he becomes of age, for the reason that he has only the naked title, by the fraudulent act of his father, and no rights against a creditor or purchaser, and therefore when he conveys, he merely parts with the naked title, and only does what a court of equity will compel him to do. (*Elliot v. Hern*, 10 *Ala. R.* 348, 353.)

In the State of Virginia, when an infant is bound to renew any lease, it is provided by statute that the person interested may make him do it by petition to the circuit court or the court of chancery. (*Code of 1849, ch. 36, § 1.*) Where the court directs an infant to convey real estate in performance of an agreement entered into by the ancestor in his life-time, and such infant releases and conveys the title whereof the ancestor died seised, he cannot repudiate his deed on coming of age. (*Matter of Ellison, 5 Johns. Ch. R. 261.*) However, when the infant is ordered to convey, in such a case the conveyance should be executed and delivered for him by the guardian *ad litem* (*Van Schaick v. Stuyvesant, 2 Edw. Ch. R. 204*); and the conveyance must conform to the order of the court directing such conveyance in performance of the contract of the ancestor. (*Hyatt v. Seeley, 11 N. Y. R. 52.*)

An infant who receives property under a contract of sale to him and then surrenders it to the seller, intending to give up all his interest in it, cannot afterward avoid such surrender and retake the property from the possession of the seller. He is bound by his act of surrender as absolutely as though he were an adult. The sale to the infant would be voidable by him and his surrender of the property would be an act of avoidance, and would invest the rights of the vendor in him, and the infant would thereby cease to have any right over the property. (*Edgerton v. Wolf, 6 Gray's R. 453.*)

Lord Mansfield laid down the rule, as collected from the books in his day, "that the acts of an infant which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding;" and he, therefore, held that the conveyance of an infant mortgagee is binding from the fact that conveying is no more than delivering up a security when it is satisfied. (*Zouch v. Parsons, 3 Burr. R. 1794, 1802.*) And generally speaking, it may be averred that an infant at common law may do acts in which he is a "mere instrument or conduit pipe," and in which his interest is not concerned. (*Hearle v. Greenbank, 3 Atk. R. 710.*) Upon this principle he may execute a power simply collateral, though he cannot execute a power over property of any kind which is not simply collateral. (*Hearle v. Greenbank, 3 Atk. R. 695.*)

Where a statute declares the effect of any particular proceeding, and makes no exception, the court can make none on the ground of any inherent equity applicable to infants. (*Demarest v. Wyn-*

coop, 3 *Johns. Ch. R.* 138, 147.) In the construction of statutes as applicable to these cases, the only inference to be drawn from the authorities is, that when the words of a law, in their common and ordinary signification, are sufficient to include infants, the virtual exception must be drawn from the intention of the legislature, manifested by other parts of the law, from the general purpose and design of the law, and from the subject-matter. (*Earl of Buckinghamshire v. Drury*, *Wilmot's Notes* 194.)

§ 95. As has been before stated, the rule is that whatever the law requires an infant to do he may do, and his act will absolutely bind him. On this subject, Professor Parsons says, that there is no principle of law placing infants on the same footing as other persons whenever they enter into contracts which owe their validity and the means of their enforcement to statutes; and, further, that in all statutes containing general words there is an implied or virtual exception in favor of persons whose disability the common law recognizes. (1 *Parsons on Con.* 282, referring to the *Northwestern Railway v. McMichael*, 5 *Exch. R.* 124.)

In a case in the court of queen's bench, two of the judges—Lord Denman and Patteson, J.—expressed the opinion that when, by a statute, a shareholder in an incorporated company is liable to the company for calls in his character of shareholder, the fact of infancy will make no difference. (*Cork and Bandon Railway v. Cazenove*, 10 *Q. B. R.* 935.) But the court of exchequer (in the case of the *Northwestern Railway v. McMichael*, *supra*) refused assent to the doctrine. This, however, does not at all conflict with the rule that when a statute *requires* certain specified parties to enter into a given obligation, without any exception, infants are included, and their acts cannot be avoided.

§ 96. Another class of binding contracts made by infants comprises those made in compliance with a statute authorizing them to make contracts for the public service. For example, the statute authorizes an infant of a certain age to enlist in the army or navy, and such a contract is neither void nor voidable. (*Story on Con.* § 73. *United States v. Bainbridge*, 1 *Mason's R.* 71. *Commonwealth v. Harrison*, 11 *Mass. R.* 65. *Commonwealth v. Cushing*, *Ib.* 71. *Commonwealth v. Murray*, 4 *Binn. R.* 487.)

In the State of Pennsylvania it has been held that such an enlistment is binding at common law. (*Commonwealth v. Jamble*, 1 *Serg. & Rawle's R.* 93.) By the law of Congress and the statutes

of most of the States, the consent of the parent or guardian is necessary in order to the validity of the enlistment, and if such consent be not obtained the minor may be discharged by State authority. (*Matter of Carlton*, 7 Cow. R. 471. *State v. Dimick*, 12 N. H. R. 194. *Commonwealth v. Callan*, 6 Binn. R. 255. *United States v. Anderson*, Cooke's [Tenn.] R. 143.) But the consent, however, need not be obtained *before* the enlistment. (*Commonwealth v. Carnac*, 1 Serg. & Rawle's R. 87.)

In Maine and Massachusetts the enlistment of an infant over eighteen years of age into a *volunteer* company is neither void nor voidable, although made without the consent of parent or guardian. (*Stevens v. Foss*, 18 Maine R. 19. *Porter v. Sherburne*, 21 ib. 258. *Commonwealth v. Frost*, 13 Mass. R. 491. *Dewey, Petitioner*, 11 Pick. R. 265.) And in such case the infant would be liable on a prosecution, *criminaliter*, for neglect of duty. (*Winslow v. Anderson*, 4 Mass. R. 376. *Stevens v. Foss*, *supra*. *Porter v. Sherburne*, *supra*.)

By the statute of New York it is declared that no person under the age of twenty-one years shall enlist in or join any uniform troop or company without the consent of his parent or guardian, master or mistress. (*Laws of 1862, ch. 477, § 33*.) An enlistment contrary to this statute would be void. An agreement of an infant under the age requisite for enrollment into the militia to go as a substitute for another into actual service, is not binding, even though made with the consent of his father, and although the consideration be fully paid. (*Grace v. Wilber*, 10 Johns. R. 453.) The rule would be different when there is a statute specially providing for the engagement to serve as a substitute, as there was with reference to service in the late war of the rebellion in the United States. If the statute authorize the employment of substitutes under age, then, of course, the engagement of a substitute would be binding on the infant the same as in the case of an original enlistment. But when a minor is held to service in the army or navy by force of a statute, Professor Parsons states, upon authority, that it is not the contract of enlistment which binds him, but the statutory duty. "In all cases," he adds, "the only criterion is, whether the liability is derived from the contract. If it be derived from contract, the common law exceptions apply to it; otherwise not." (*Parsons on Con.* 281, citing *United States v. Bainbridge*, 1 Mason's R. 71, and *Parke, B. Newry & Enniskillen Railway v.*

Coombe, 3 *Exch. R.* 569.) But however this may be, perhaps, is not very material. It is only important to show that minors are bound by such engagements.

§ 97. Another act of an infant which he may not repudiate is his engagement to serve as an apprentice to learn some art or trade with the consent of his parents or guardian, or other person provided by statute. This act, being manifestly for the benefit of the infant, he is competent to perform, and the relation of master and apprentice, created by the indenture to which he is a party, cannot be dissolved by the infant. (*Rex v. Great Wigston*, 10 *Eng. C. L. R.* 161. *King v. Amesby*, 5 *ib.* 385. 10 *Mees. & Wels. R.* 195. *Woodruff v. Logan*, 1 *English's [Ark.] R.* 276.

Formerly, if not at present, by the custom of London in England, an infant unmarried and above the age of fourteen, could bind himself apprentice to a freeman of London, by indenture, with proper covenants, and the same was as binding as though the party had been of full age, and for a breach of the covenants contained in the indenture an action could be brought in any other court as well as in the courts of the city. (*Bing. on Inf.* 90, *per opinion of Lord Eldon*. *Brand v. Webb*, 2 *Bos. & Pull. R.* 96.)

The father or parent at common law might bind his infant an apprentice without the infant joining in the articles; but, as a general rule, both in England and in this country, the matter of master and apprentice is governed by statute, and, in all such cases, the statute is considered as controlling the common law. (*Matter of McDowles*, 8 *J. R.* 331.) It has been held in one case in Massachusetts, that the father may, at common law, bind his infant son to service independent of a statute. (*Day v. Everett*, 7. *Mass. R.* 145.) But this doctrine is contrary to the rule in England, and to the construction given to the statutes of several of the American States. The rule, as laid down in England, is, that infants of either sex may be bound by indenture executed by themselves and not otherwise, as apprentices to any person, to an infant even, for any number of years, but the indentures are voidable by the infants at twenty-one, and will be held to be avoided by a proper and deliberate announcement to that effect. (*McPherson on Inf.* 479. *Rex v. St. Petreux*, 4 *T. R.* 196. *Ex parte Davis*, 5 *ib.* 715.)

§ 98. The origin of the English law of apprenticeship, as given by Professor Parsons, is interesting and worthy to be noted. It seems that the law grew out of and rested upon the ancient estab-

lishment of guilds or companies for trade or handicraft, which were once almost universal throughout Europe, and still generally subsist, though much modified in form and effect. No one could pursue a trade or mechanical occupation on his own account who was not a member of such guild or company. Nor could he become a member except by a regular apprenticeship. A change of trade, therefore, became very difficult, and the several companies provided with great care against such increase of their members as should render it too difficult for all to find occupation. Under such circumstances, to enter upon an apprenticeship which led to such membership was to acquire a support for life, and it was usual to pay large fees to the master. This custom exists in England at the present day. (1 *Parsons on Con.* 533.)

In this country every employment is open to all, and every person is at liberty to engage in such business as he pleases, and to change his business as often as he pleases, and therefore the apprenticeship system is less important and apprenticeships less common with us than in Europe.

§ 99. The subject of apprenticeship is regulated by statute in England and in most of the American States. In the State of New York every male infant, and every unmarried female under the age of eighteen years, may, of his or her own free will, bind himself or herself, in writing, to serve as clerk, apprentice or servant in any profession, trade or employment; if a male, until the age of twenty-one years, and if a female, until the age of eighteen years, or for any shorter time; and such binding will be as valid and effectual as if such infant was of full age at the time of making the engagement. Such binding, however, must be with the consent of the father of the infant. If he be dead, or be not in a legal capacity to give his consent, or if he have abandoned and neglected to provide for his family, and such fact be certified by a justice of the peace of the town, and indorsed on the indenture, then the consent may be given by the mother of the infant. If the mother be dead, or be not in a legal capacity to give such consent, or refuse, then the consent may be given by the guardian of the infant duly appointed. If the infant have no parent living, or none in a legal capacity to give consent, and there be no guardian, then the overseers of the poor, or any two justices of the peace of the town, or any judge of the county court of the county where the infant resides, may give the consent. The consent is required to

be signified in writing, by the person entitled to give the same, by a certificate at the end of, or indorsed upon, the indentures, and not otherwise. The executors of any last will of a father, who is directed in such will to bring up his child to some trade or calling, may bind such child to service as a clerk or apprentice, in the same manner as the father might have done if living. In case the child has been sent to the county poor-house, or is chargeable to the county, the county superintendents of the poor may bind out such child; or in case the child is chargeable to a town or city, then the overseers of the poor of such town or city may bind out such child to be a clerk, apprentice or servant, with the consent, in writing, of any two justices of the peace of the town, or of the mayor, recorder or alderman of the city, or any two of them; which binding will be as effectual as if the child had bound himself with the consent of his father. The age of the infant so bound must be inserted in the indentures, and will be taken to be the true age without further proof; and whenever public officers are authorized to execute the indentures, or their consent is required to the validity of the same, it is made their duty to inform themselves fully of the infant's age. Every sum of money paid or agreed for, with or in relation to the binding out of any clerk or apprentice, must be inserted in the indentures. If the child is bound out by the superintendent of the poor of the county, or by the overseers of the poor of a city or town, the indentures must contain an agreement on the part of the person to whom the child is bound, that he will cause such child to be instructed to read and write, and, if a male, will cause him to be instructed in the general rules of arithmetic, and that the master will give to the apprentice, at the expiration of his or her service, a new Bible. . (2 *R. S. part 2, ch. 8, title 4, art. 1, §§ 1-11. 2 Stat. at Large, 160-162.*)

§ 100. The statute of New York may be taken as a sample, in all essential respects, of the general law in the several states, and contains the substance of the English statute law on the subject. By the New York statute it is expressly declared that no indenture or contract for the service of an apprentice shall be valid as against the person whose services may be claimed, unless made in the manner prescribed; and the county superintendents of the poor and the overseers of the poor are made the guardians of every person bound or held to service in their respective cities or towns, to take care that the terms of the contract of service be fulfilled, and that

such person be properly used ; and it is made their especial duty to inquire into the treatment of every such person and redress any grievance in the manner prescribed by law. It is further provided that if any person lawfully bound to service shall willfully absent himself from such service, without the leave of his master, he shall be compelled to serve double the time of such absence, unless he otherwise make satisfaction for the loss and injury sustained by such absence ; but the additional service can in no case extend beyond three years next after the end of the original term of service. If any apprentice shall refuse to serve, according to the provisions of the statute or the terms of his contract or indentures, his master may apply to any justice of the peace of the county, or to the mayor, recorder, or any alderman of the city where he resides, who is authorized by warrant or otherwise to send for the person so refusing, and, if such refusal be persisted in, to commit such person by warrant to the bridewell, house of correction, or common jail of the city or county, there to remain until such person consents to serve according to law. On complaint being made on oath, by any master, touching any misdemeanor or ill behavior of any such person, to any two justices of the peace of the county, or to the mayor, recorder, and aldermen of any city, or any two of them, it is made their duty to cause the person complained of to be brought before them, to hear, examine and determine the complaint ; and if the complaint appear to be well founded, the officers may, by warrant, commit the offender to the house of correction, or to the common jail of the county, for any term not exceeding one month, there to be employed in hard labor and to be confined in a room with no other person ; or they may, by a certificate under their hands, discharge the offender from his service and the master from all obligations to such offender. And if any master be guilty of any cruelty, misusage, refusal of necessary provisions or clothing, or any other violation of the provisions of the law, or of the terms of the indenture or contract, toward any such person bound to service, such person may make complaint to any two of the officers above specified, who are thereupon required to summon the parties before them, and examine into, hear and determine the complaint, and by certificate under their hands discharge such person from his obligation of service. In case the master or mistress of any such apprentice shall have received, or be entitled to receive, any sum of money with the apprentice. as a compensation for his instruction,

then, on the complaint aforesaid, the said officers may make such order and direction between the master and the person bound to service as the equity of the case may require; and, if the difficulty cannot be compounded or reconciled, the officer may recognize the master to appear at the next court of sessions of such county, in such sum and with such sureties as he shall approve, and the matter will then be adjudicated upon and disposed of by the court of sessions. (2 *R. S. part 2, ch. 8, tit. 4, art. 3*, §§ 26-43. 2 *Stat. at Large*, 165-167.)

§ 101. Infants coming from any foreign country beyond sea, may bind themselves to service until they attain the age of twenty-one years, or for a shorter term, or if such contract of service be made for the purpose of raising money to pay his passage, or for the payment of such passage, the term may be for one year, although such term may extend beyond the time when such person will be of full age, but it cannot be for a longer term. Such contract, however, will not bind the servant, unless it be acknowledged by him before some mayor, recorder, or alderman of a city, or before some justice of the peace; nor unless a certificate of such acknowledgment, and that the same was made freely on a private examination, be indorsed on such contract; and such contracts, in cases of infants coming from beyond sea, may be assigned by the master, by an instrument in writing indorsed thereon, executed in the presence of two witnesses, provided the assignment be approved of, in writing, by any of the magistrates above mentioned, and such approbation must be indorsed on the contract. (2 *R. S. part 2, ch. 8. tit. 4, art. 1*, §§ 12-14. 2 *Stat. at Large*, 162.)

§ 102. In the State of Maine, infants may be bound as apprentices or servants, females until they are eighteen years of age, and males until they are twenty-one, by the father, or, if he be dead or legally incompetent, by the mother or lawful guardian, and if illegitimate, by the mother, or, if there be no competent parent or guardian, then the minor may bind himself, with the approbation of the selectmen of the town. If the infant is above the age of fourteen, he must assent to the contract by signing the indenture. The overseers of the poor may bind out the children of paupers. The court may discharge either party from the obligations of the contract for good cause, as in New York. The death of the master discharges the apprentice, and the articles are not assignable; but the father may assign or contract for the services of his children

during their minority. (*R. S. chs. 24, 62.*) The same is substantially the law in New Hampshire, (*Comp. Stat. 1853, ch. 160*), also in Massachusetts (*Gen. Stat. ch. 111, §§ 2, 3*).

In Massachusetts, however, the statute provides that a responsible person shall become obligated to the master of the apprentice in the sum of two hundred dollars, that the apprentice shall faithfully serve such master the full term of apprenticeship. (*Supplement to Gen. Stat. ch. 270.*)

And in the same state, it has been held that an indenture made in another state, between the citizens thereof, by which a mother, after the death of the father, commits a child to the care and custody of a trustee of a society of Shakers, to be brought up and instructed according to their principles and usages, is binding on the mother, although not in the form prescribed by the laws of that state, in order to bind the child; and if the child be well cared for by the Shakers, and being of sufficient mind and capacity to judge, desire to remain with them, the mother will not be allowed to reclaim such child. (*Curtis v. Curtis*, 5 *Gray's R.* 535.)

In the State of Vermont, minors over fourteen years of age may be bound as apprentices and servants by their father or guardian, with the expressed consent of the minor in the indenture, and certified by his signing the same. (*R. S. 1863, ch. 72, § 48, and ch. 73, §§ 1-3.*) The selectmen are required to inquire into the treatment of apprentices and servants employed in manufacturing establishments. (*Ib. ch. 72, § 11.*) In the State of Rhode Island the law on this subject is similar to that in Vermont. (*R. S. 1857, ch. 139, §§ 1-26.*) The law is substantially the same in Connecticut as in Vermont, and it is expressly held by the courts of Connecticut that a parol binding is not valid, and that an apprenticeship cannot be created except by an instrument in writing. (*R. S. 1866, tit. 13, ch. 6, § 93. Peters v. Lord*, 18 *Conn. R.* 337.) The law is substantially the same in New Jersey as in Connecticut. (*Elmer's Dig. 1855, p. 22, § 1.*) The same in Pennsylvania. (*Purdon's Dig. ch. 51, § 1.*) The same in Ohio, but if the guardian binds the infant out, the court of common pleas must approve the terms. (1 *R. S. ch. 5.*) The same in Missouri. (*Gen. Stat. ch. 117, §§ 2, 3.*) The same in Oregon. (*Gen. Laws 1845-1864, ch. 12, § 37.*) The same in Virginia. (*Code, 1849, ch. 126, § 1.*)

The law in Michigan is substantially the same as in New York. (2 *Comp. Laws, ch. 111.*) In Wisconsin the same. (*R. S. ch. 113.*)

The same in Kentucky, though it is expressly provided that on the death of the master, servitude ceases. (2 *R. S. ch.* 64.) In Iowa the law is similar to the New York statute. (*Rev. Laws* 1860, *ch.* 106.)

The law in Louisiana is the same substantially as in Maine, except that the consent may be given to the apprenticeship by the father of the infant or his tutor, or the parish judge. The contract must be made before a notary, and read to and signed by the parties. (*R. S.* 1856, *p.* 336, § 1.)

In North Carolina, the county court may bind out poor orphan children and illegitimate children for the usual terms as apprentices; and the master is required to teach them to read and write, and at the expiration of their apprenticeship to make them an allowance (1 *Revised Code*, *ch.* 5, §§ 1, 2); and the infant can only be bound by a deed executed by both the father and the child. (*Musgrove v. Kerneygay*, 7 *Jones' Law R.* 71.)

In Maryland, the father may bind out his infant child as an apprentice on reasonable terms, without any consent on the part of the child. (1 *Maryland Code*, *art.* 6.) The laws of the other states upon the subject are probably quite similar to those of the states named, and the general principles of apprenticeships applicable in England and in the states already enumerated, are recognized in all the states.

§ 103. In England and in many of the states of the American Union, statutes exist having for their object the protection of children from laborious toil unsuitable to their years. Thus, in England the hours of labor for apprentices and servants are limited to ten hours in any one day, and to fifty hours in any one week. (10 & 11 *Vict. ch.* 29.)

In the State of Maine, children under fourteen years of age are not to be employed in manufacturing establishments more than ten hours per day. (*R. S. chs.* 48, 82.) There is a similar provision in New Hampshire. (*Comp. Laws* 1853, *ch.* 149, § 35.) And also in Pennsylvania. (*Brightley's Dig.* *p.* 452, §§ 1-6.) In the State of Connecticut children under ten years are not to be employed in factories at all, and those above that age and under eighteen are not to be employed in any manufacturing or mechanical establishment more than twelve hours in any one day, or more than sixty-nine hours in one week. (*R. S.* 1866, *tit.* 13, *ch.* 4, § 50.)

In the State of Massachusetts, it is provided that children between the ages of twelve and fifteen years of age, who have been in the state six months, shall not be employed in any manufacturing establishment unless they have been in school under competent teachers for at least eleven weeks during the twelve months next preceding the employment of such children in such factory, and that during each twelve months of such employment they shall be in school the like term of eleven weeks under like competent teachers. (*Gen. Stat.* 1860, *ch.* 42, § 1.) And children under twelve years of age are not to be employed in a factory exceeding ten hours in any one day, under a penalty of fifty dollars. (*Ib.* § 3.) And in the State of New Jersey, no child under the age of ten is permitted to work in a factory at all, and no minor above that age can be required to work in any manufacturing establishment more than ten hours in any one day, or more than sixty hours in one week. (*Laws* 1851, *p.* 321. *Elmer's Dig.* 1855, *p.* 335.) This humane legislation is gaining ground in most of the states, and exertions are being made in some instances to limit the hours of labor per day still more than the examples here given.

§ 104. Some general rules with respect to apprenticeships may be noted. The contract of apprenticeship must be in writing, and is most usually by deed; and unless there is some statute to the contrary the infant cannot be bound by an act *in pais*, nor unless he is a party to the writing or deed. This is understood to be the rule at common law, though the necessity of the infant's joining in the deed is often prescribed by statute. (*The King v. Cromford*, 8 *East's R.* 25. *The King v. Amesby*, 5 *Eng. C. L. R.* 385. *Mather v. McDowles*, 8 *Johns. R.* 328. *Stringfield v. Hirskill*, 2 *Yerger's [Tenn.] R.* 546. *Pierce v. Messenbury*, 4 *Leigh's R.* 493. *Harvey v. Owen*, 4 *Blackford's [Ind.] R.* 337. *Batch v. Smith*, 12 *N. H. R.* 438. *Caster v. Aicles*, 1 *Salkeld's R.* 68. *The King v. Bow*, 4 *Maule & Selwyn's R.* 383. *Squire v. Whipple*, 1 *Vt. R.* 69. *Commonwealth v. Wilbanks*, 10 *Sergeant & Rawle's R.* 416. *Stokes v. Hatcher*, 1 *South. [N. J.] R.* 84.) The term of service for males is usually until the infant arrives to the age of twenty-one; and for females until she attains the age of eighteen, although the indentures will be binding if the term is to end at an earlier period. (*Brown v. Harris*, 5 *Gratt. [Va.] R.* 285.)

The master may chastise his apprentice for negligence or misbehavior, though it must be done with moderation. (*Commonwealth v. Baird*, 1 *Ashmead's* [Penn.] R. 267.)

The better opinion is that the trust reposed in the master is a personal one, and that therefore an indented apprentice cannot be assigned from one master to another, and in North Carolina, Alabama and Massachusetts, it has been *expressly*, and in New York, *impliedly*, so held. (*Hall v. Gardner*, 1 *Mass. R.* 172. *Davis v. Colman*, 8 *ib.* 299. *Randall v. Rotch*, 12 *Pick. R.* 109. *Ayn v. Chase*, 19 *ib.* 556. *Williams v. Finch*, 2 *Barb. R.* 208. *Nickerson v. Howard*, 19 *Johns. R.* 113. *Tucker v. Magee*, 18 *Ala. R.* 99. *Fretwell v. Vann*, 8 *Ired. R.* 402.) Such assignment, however, would amount to a contract between the two masters, that the child should serve the latter master, so that the assignment is good by way of covenant, though not as an assignment, to pass an interest. (*Nickerson v. Howard*, *supra*.) The assignment of the indentures with the assent of the apprentice, and the serving the assignee by the apprentice the whole term of service, will be deemed a continuance of the apprenticeship with the infant's consent, so that he cannot recover pay for his services. (*Williams v. Finch*, *supra*.) Under the statute of Pennsylvania, the assent of both father and apprentice is requisite to a valid assignment by the indentures. (*Commonwealth v. Van Lear*, 1 *Serg. & Rawle's R.* 248.)

Indentures of apprenticeship are not rendered invalid by an omission to specify the profession, trade or employment in which the apprentice is to be instructed. It is sufficient if the minor covenants to be under the care and in the employment of the master, and the master covenants that, in addition to supporting, clothing and educating the minor, he will teach him, or cause him to be taught, such manual occupation or branch of business as shall be found best adapted, or most suitable to his genius and capacity. If the indentures do not conform to the statute in any essential particular, they are only voidable by the apprentice, and cannot be avoided by any other person. It is no objection to the indentures that the binding is to the master as trustee of a religious society or sect. The additional words are merely *descriptio personae*, and the binding is deemed to be to the master individually and personally. (*Fowler v. Hollenbeck*, 9 *Barb. R.* 309.)

Should a minor, indentured as an apprentice, serve his master in that capacity until it was discovered that the indentures are void

by reason of their not having been executed by the minor's father, the master will not be liable to the father to make compensation for the services of the minor. Although the contract of apprenticeship be void, yet, while the parties reside together, mutually performing the conditions of the contract, the relation of master and servant exists as really as if the indentures were binding. (*Maltby v. Harwood*, 12 Barb. R. 473.)

An infant who has labored for another for three years may recover the price agreed upon for his services, although the contract was not binding upon the infant for the reason that it was not in compliance with the statute in relation to apprenticeships. (*Davies v. Turton*, 13 Wis. R. 185.)

The person who is to consent to the binding of the apprentice must do so by a certificate, at the end of or indorsed upon the indentures, and the mere signatures of the latter, though they express his consent, will not answer. No form of words, however, is necessary in the certificate, but it is sufficient if it fairly import the requisite consent. (*The People v. The First Judge of Livingston County*, 2 Hill's R. 596.)

In the binding of an infant town pauper, if there are two overseers of the poor of the town, they must both join in the execution of the indentures. (*Overseers of the Poor of Hamilton v. Overseers of the Poor of Eaton*, 6 Cow. R. 658.)

§ 105. At common law the infant is not liable for a breach of the covenants in his indentures of apprenticeship, and in an action brought against him for violating such covenants, he may plead his infancy as a defense. (*Cumming v. Hill*, 3 Barn. & Ald. R. 59. *Gylbert v. Fletcher*, Cro. Car. 179. *Jennings v. Pitman*, Hulton's R. 63. *Lylly's case*, 7 Mod. R. 15. *Whitley v. Loftus*, 8 ib. 190. *Frazier v. Rowan*, 2 Brev. R. 47. *McKnight v. Hogg*, 3 ib. 44. *Blunt v. Melcher*, 2 Mass. R. 228. *Harper v. Gilbert*, 5 Cush. R. 417.) As has been observed, by the custom of London, infancy would be no defense in such cases (*ante*, § 97); and in the State of Arkansas it was said in one case that the contract of apprenticeship was binding upon the infant in such a way as to make him liable for a breach of his covenants (*Woodruff v. Logan*, 1 Eng. R. 276); but this is not according to the current of authority. The apprentice, however, cannot abandon his master's service and avoid his indentures unless his master desert him, and if he does so he will be liable to be proceeded against in the manner usually pre-

scribed by statute. (*Rex v. Great Wigston*, 10 *Eng. C. L. R.* 161. *King v. Mountsovel*, 3 *Maule & Selw. R.* 497.)

In case of the sickness of a minor, his master is bound to furnish proper medicines and attendance, and the sickness of an apprentice, or his inability to learn or serve without his fault, does not discharge the master from his covenants. (*Rex v. Owen*, 1 *Strange's R.* 99. *Winestone v. Linn*, 1 *Barn. & Cress. R.* 460.)

In one case in England, Lord Denman said, "There is a great difference between a contract of apprenticeship and a contract with a servant. A person has a right to dismiss a servant for misconduct, but has no right to turn away an apprentice because he misbehaves." (*Wise v. Wilson*, 1 *Carr. & Kirwan's R.* 662.) If the apprentice desert his master and enter into new relations, so as to put it out of his power lawfully to perform his first indentures, the master is under no obligation to receive the apprentice back, although he may offer to return. (*Hughes v. Humphreys*, 6 *Barn. & Cress. R.* 680.) Upon the death of the master the apprenticeship is dissolved, for the same reason that the indentures cannot be assigned by the master. The trust is personal. However, the assets in the hands of the representatives of the master are chargeable with the necessary maintenance of the infant apprentice. (2 *Kent's Com.* 266. *The King v. Peck*, 1 *Salk. R.* 6. *Baxter v. Burfield, Str. R.* 1266.)

It has been held in Louisiana, and the doctrine is certainly very reasonable, that the contract of apprenticeship is personal, and not susceptible of alienation without the consent of all parties, and consequently, that it ceases on the insolvency as well as the death of the master, inasmuch as his character and disposition enter into the consideration of the contract (*Versailles v. Hall*, 5 *Miller's R.* 266; *vide also* 2 *Kent's Com.* 266, *note b*); and this is in accordance with the express provisions of the statute in several of the states. (*Ante*, § 103.)

The master is entitled to the earnings of the apprentice, and should the apprentice run away and labor for another, the master would be entitled to his wages or gains. (2 *Kent's Com.* 265, *note a*.) The master has no right to employ his apprentice in menial services, if the apprenticeship was to a particular art or trade. (*Commonwealth v. Hemperly*, *Law Reporter [Penn.]*, July, 1849, *p.* 129. *Ellen v. Topp*, 4 *Eng. L. and Eq. R.* 412.) And it is held in Pennsylvania that if the master neglects to take charge of the apprentice

for the entire term, the authority of parent or guardian will supervene. (*Commonwealth v. Conrow*, 2 *Barr's R.* 402.) This rule, however, would not apply in those states where statutes exist prescribing the method of proceeding to dissolve the relation of master and apprentice.

§ 106. From the fact that the infant may set up his infancy as a defense for violation of his covenants, it is common for some friend of the infant to undertake for his faithful discharge of his office, according to the terms agreed on. (4 *Bac. Abr.* 562, *tit. Master and Servant.*)

But in order to make the third person liable, he must be a party to the covenant. Thus, in one case in Massachusetts, involving the question, Parker, J., in giving the opinion of the court, observed: "The question for our determination is, whether the defendant is bound by the covenants in this indenture for the apprentice's good conduct. My opinion is, decidedly, that he is not bound. He is not mentioned as a party to that or any other covenants contained in the instrument. The intent of all the parties in making this indenture, appears from the instrument itself. The apprentice binds himself with the consent of the guardian. To express that consent, and, in my opinion, with no other intent, and for no other purpose, the guardian signs and seals the instrument. It is objected to this, that great inconveniences and mischiefs will arise from this construction of this species of indenture. But to guard against these, the guardian may enter into covenants explicitly with the master, and there is no doubt such covenants will be valid and binding upon him." (*Bhunt v. Melcher*, 2 *Mass. R.* 228.)

The rule that in order to hold the parent or guardian on such articles, the undertaking must be explicit, is supported by a case also in the supreme court of the State of New York, where it was held that indentures purporting to be between the master and the infant, "by and with the consent of the guardian," naming him, and executed by all of them, did not hold the guardian for a breach of the indentures on the part of the apprentice. (*Ackley v. Hoskins*, 14 *Johns. R.* 374.) But when the indentures are in the usual form, declaring the duties of the apprentice, and concluding thus: "for the true performance of all and singular the said covenants and agreements, the said master, apprentice and guardian, have hereunto interchangeably set their hands and seals, the day and year first above written," and signed by all the

parties, the guardian will be bound to see that the apprentice fulfills all his duties to his master. (*Bull v. Follett*, 5 Cow. R. 170.)

Should the parties to a contract for the apprenticing of an infant, bind themselves, *so far as it is in their power*, to see the contract fulfilled, their respective obligations will be deemed to be limited to their legal liability to perform their several undertakings, and they will be bound so far as it depends upon their own acts, or their legal control over the minor, and no further. Should the minor, thus apprenticed, leave and abandon the service of his master, after having been in his employ some years, under the contract, and refuse to work for him any longer, it would be the duty of the party covenanting for the infant, to do what he has the legal power to do, to effect the return of the apprentice, and if he should make no endeavors, and refuse to do any thing to accomplish the object, he would make himself liable for a breach of his obligation. (*Van Dorn v. Young*, 3 Barb. R. 286.)

The parties who covenant for the good behavior of the apprentice are not liable for every trifling misconduct; it must be something which is substantial and positively injurious to the interests of the master. (*Wright v. Gihon*, 3 Carr. & Payne's R. 583. *Cuming v. Hill*, 3 Barnw. & Ald. R. 59. *Vide also Holbrook v. Bullard*, 10 Pick. R. 68.)

A party who seduces an apprentice from the employ of his master, or employs him without the knowledge or consent of his master, is liable to the master for the services of the apprentice. *Lightly v. Clouston*, 1 Taunt. R. 112. *Foster v. Stewart*, 3 Maule & Selw. R. 191. *Bowers v. Tibbets*, 7 Greenl. R. 457. *Conant v. Raymond*, 2 Aik. [Vt.] R. 243. *Munsey v. Goodwin*, 3 N. H. R. 272. *James v. Le Roy*, 6 Johns. R. 274. *But vide Ayer v. Chase*, 19 Pick. R. 556.)

A party will be liable also for harboring an apprentice against the will of the master, provided he knows of the apprenticeship. *Ferguson v. Tucker*, 2 Har. & Gill's R. 182. *Stuart v. Simpson*, 1 Wend. R. 376. *Conant v. Raymond*, *supra*.)

§ 107. Mr. Story lays it down, as gathered from the authorities, that the representative acts of an infant are binding generally, as when he is an executor or trustee, for the reason that such contracts do not concern his own interest, and to render them void would be to invalidate the contract of the *cestui que trust*, who may be perfectly competent to contract, and who has an undoubted right, if

he choose, to take the risk of the infant's competency. (*Story on Con.* § 76, citing *King v. Great Wigston*, 5 Dowl. & Ryl. R. 339. *S. C.* 3 Barn. & Cresw. R. 484.) It has been shown in what manner and under what circumstances an infant may exercise the office of an executor (*ante*, § 80); and in all those cases the acts of the infant executor are binding, and cannot be avoided. Infants not being well qualified for the performance of trusts, it is difficult to consider an infant as intended to be a trustee, and the tendency has been to interpret gifts to an infant as favorably to him as possible, and the court will not infer an intention to appoint an infant a trustee, unless it is unequivocally expressed. (*Blinkhorn v. Frost*, 2 Ves. Sen. R.)

In a leading case in England, where it appeared that the father had purchased property in the name of his son, who was an infant, the court presumed it to be an advancement, rather than make the infant a trustee. (*Lamplugh v. Lamplugh*, 1 P. Wm. R. 112.) But in a case in the court of chancery of the State of New York, where a father, who was an alien, purchased property in the name of his wife, and while the property was vested in her she died, leaving infant children, on application of the father, the court decided that the children held the property as trustees of the father, and they were ordered to convey the legal title, by their guardian *ad litem*, to the father. (*In the matter of Windle*, 2 Edw. Ch. R. 585.) And in all cases, if it distinctly appears from the circumstances, that a gift has not been conferred upon the donee for his own benefit; as when, upon the construction of a will, a person is plainly a trustee, or where a person takes a purchase in the name of another, and receives the profits himself, it will never be held that there can be no trust, on the ground that the person in question is an infant. (*King v. Denison*, 1 Vesey & Beame's R. 260, 275. *Grey v. Grey*, 2 Swanston's R. 600. *Jevon v. Bush*, 1 Vern. R. 343.) If a father purchase land in the name of an infant son, though he takes the profits and control of the land, this will not be regarded as evidence of a trust in the infant, but rather as an advancement, and the father cannot dispose of the land in any way so as to deprive his son of it. (*Grey v. Grey*, *supra*. *Lamplugh v. Lamplugh*, *supra*. *Mumma v. Mumma*, 2 Vern. R. 19. *Taylor v. Taylor*, 1 Atk. R. 386. *Stillman v. Ashdown*, 2 ib. 480. *Loyd v. Read*, 1 P. Wm. R. 607.) But in one case in England an infant was held to be a trustee of an estate purchased

in his name on account of his tender years. (*Binion v. Stone*, 2 *Freem. R.* 168.) In all cases where an infant is a clear, express trustee, he may be compelled to convey, and, in general, if he convey without an order of court, his act will bind him, though the trust must be in writing, not by construction of equity. (*Ex parte Prosser*, 2 *Br. Ch. R.* 325. *Ex parte Johnson*, 3 *Atk. R.* 559. *Ex parte Vernon*, 2 *P. Wm. R.* 549. *Hawkins v. Olean*, 2 *Vesey's R.* 559.) And it has been held in New Jersey, that a resulting trust cannot be established against an infant except by decree of court, in a suit regularly instituted, the chancellor remarking that the principle of the cases is that the court will proceed, under the statute, only when trusts are created by express declaration, or have been settled by a decree. (*In the matter of Follen, McCarter's Ch. R.* 147.) So also it was held by the late court of chancery of the State of New York, that where a resulting trust comes within the provision of a statute, an infant may be decreed to convey such trust, on its being established by parol proof. (*Livingston v. Livingston*, 2 *Johns. Ch. R.* 537.) If the infant trustee be a *feme-covert*, she may be directed by the court to convey by fine. (*Ex parte Maire*, 3 *Atk. R.* 479.) A minor holding land in trust for another, who has given a bond for its conveyance, may convey the land according to the bond, and he will not be allowed to plead infancy to invalidate his deed; because he could be compelled to convey the land, and his conveyance, without legal compulsion, is good. (*Prouty v. Edgar*, 6 *Clarke's [Iowa] R.* 353.) The same rule obtains in case the infant is the trustee of a charity. (*Attorney-General v. Pomfret*, 2 *Cox's R.* 221.) In fact, all the acts of infants, in the capacity of trustees, are binding, and all necessary costs will be allowed the infant, and he will be liable for a fraudulent execution of the trust. (*Platt v. St. Clair*, 6 *Ohio R.* 227. *Ex parte Vernon*, *supra*. *Goodwyn v. Lyster*, 3 *ib.* 387. *Ex parte Cant*, 10 *Ves. Jr. R.* 554.)

§ 108. An infant is bound by all conditions, charges and penalties, in an original conveyance, whether he comes to the estate by grant or descent. So by conditions annexed to the estate, at common law, because "*transit cum onere*"—"it passes with the burden;" and, therefore, if the infant will have the estate, he must observe the condition upon which it was granted. On this principle, if a person devise to his granddaughter, who is not heir at law, lands, upon condition she marry with the consent of certain

trustees, she is obliged to take notice, at her peril, of the condition, and likewise to perform it; but had she been heir at law, she must have had notice given her of the condition, to make the marriage without consent, a forfeiture. (*Bing. on Inf.* 96.) A gift to an infant, on condition, binds him as well as an adult. (*Scott v. Houghton*, 2 *Vern. R.* 560.) Lord Coke makes a distinction between conditions in fact that are expressed, and conditions in law that are implied. If the condition is founded on skill, and is broken, the infant is barred forever. If not founded on skill and confidence, the rule is otherwise. (*Whittingham's case*, 8 *Coke's R.* 44.)

CHAPTER X.

HOW FAR THE LAW PROTECTS AN INFANT AGAINST HIS LACHES—EXCEPTIONS TO THE RULE IN HIS FAVOR—HOW AFFECTED BY THE STATUTE OF LIMITATIONS—LAWS OF THE SEVERAL STATES—JUDGMENTS AND DECREES AGAINST INFANTS.

§ 109. It is a maxim of law that no laches or neglect is imputable to an infant *durante minoritate*, because he is not supposed to be cognizant of his rights, nor capable of enforcing them. (*Ware v. Brush*, 1 *McLean's R.* 533. *State v. McNight*, 1 *Bay's [S. C.] R.* 65.) On this ground the right of entry is presumed for infants in many cases in which it is lost to adults. (*Lit. S.* 402, 403.) The staleness of the demand or transaction is no prejudice, if infancy occur. (*Whaley v. Eliot*, 1 *A. K. Marsh. [Ky.] R.* 345. And no presumption is indulged against an infant by lapse of time.* (*Calhoun v. Baird*, 3 *A. K. Marsh. [Ky.] R.* 169.) This is the general rule, but it is subject to many qualifications and exceptions. For example, there is a lapse if an infant patron does not present to a

* In a distinguished case, decided three hundred years ago, by one of the highest courts of England, involving the conclusive nature of a fine levied and proclaimed, as against an infant, after the running of the statute of limitations, the doctrine was unequivocally laid down, that "laches of suit or entry cannot be imputed to an infant, whom God has not endowed with understanding or reason; for if he should take an action, his right and his action might be such as a writ of right, and the like, which he could not prosecute, nor compel the other party to answer during his nonage, but the parol should demur, and then it would be in vain to force or to take an action during his nonage, which he cannot prosecute, nor compel the other party to answer during his nonage, and such never was the intent of the makers of the act." (*Stowel v. Zouch*, *Plowdson's R.* 364.)

benefice within six months; and in former times he lost his right to a villein by nonclaim for a year and a day, and forfeited his copyholds by neglecting to pay his fine and to take admittance; and he may lose his estate by failing to perform a condition annexed to the estate. (*Co. Litt.* 246 a. 344, b. 380 b. *Whittingham's case*, 8 *Coke's R.* 88.) So if a feoffment be made reserving rent, with a condition of re-entry in default of payment, if the person entitled under the feoffment be an infant and fail to pay, his laches will bar him. (*Co. Litt.* 246 b.)

In the State of Pennsylvania it was held that an acquiescence of twenty-eight years in an award, and the enjoyment of land under it by the infant, is a strong obstacle to any attempt to rid himself of the sum to be paid for it, by nice objections to the form of submission. (*Hume v. Hume*, 3 *Barr's R.* 144.) And in the State of Maryland, it was held that when an infant waited six years after the entry of a judgment against him in an action in which he appeared by attorney, his laches deprived him of the right to set the judgment aside for the irregularity. (*Kemp v. Cook*, 18 *Maryland R.* 130.)

But in Kentucky, it has been decided that rents accruing during the minority of the *cestui que trust*, are not barred by lapse of time. (*Pugh v. Bell*, 1 *J. J. Marsh. R.* 399.) And in South Carolina, it has been held that an infant who brings a suit for the recovery of land within the time allowed to infants, cannot be deemed guilty of laches. (*Washington v. Huger*, 1 *Dessau. R.* 596.) When the matter is regulated by statute, and there is no saving or exception in favor of any incapacity, laches will bar an infant the same as an adult. (*Rayner v. Watford*, 2 *Dev. [N. C.] Law R.* 338.)

§ 110. Another exception to the rule that no laches or neglect is imputable to an infant, may be found in a case where the rule might happen to be a public mischief, as in what is termed a *bastard eigne* and *mulier puisne*. This happens in England, when a man has a bastard son, and afterward marries the mother, and by her has a legitimate son, who was begotten before wedlock. Here the eldest son would be *bastard eigne*, and the younger son would be *mulier puisne*. In such a case, if the father dies, and the bastard enters upon his land, and enjoys it to his death, and dies seised of it, whereby the inheritance descends to his issue, the younger son, though a minor, will be barred of his rights. (2

Black. Com. 248.) In this case, it is said, the law has not thought fit to except the infant from the imputation of laches, because such exception might happen to be a public mischief in a very tender point; for it might be any man's case to suffer by the bastardy of an ancestor; and it is difficult to review the evidence of legitimation, which so easily perishes with the life of the party. (*Bing. on Inf.* 99.) But this indulgence was not shown to any other kind of a bastard; for if the mother was never married to the father, such bastard could have no colorable title at all. (*Co. Litt.* § 400. *Pride v. Earls of Bath and Montague*, 1 *Salk. R.* 120.)

§ 111. By the common law, infants are not bound for want of claim and entry within a year and a day, as is the case with adults, nor are they bound by a fine and five years' non-claim, nor by the statutes of limitation, provided they prosecute their right within the time allowed after the impediment is removed. But if the five years begin to run in the time of the ancestor, and he die before they are expired, having made no claim, the heir, though an infant, will be barred if he does not claim within the five years. (*Stowel v. Zouch*, *Plowdon's R.* 358.) And when an infant, not being a party to a fine, and having a present right, dies during his infancy, his heir must enter within five years after such death, and not at any time after. (*Cotton's case*, 1 *Simon's R.* 215. *Dillon v. Leman*, 2 *H. Bl. R.* 584.)

Infants are not bound by a "*cessavit per biennium*"—"he ceased for two years"—because the law intends that they do not know what arrearages to tender. But this writ is of no consequence in the American States, and in England it has given place to speedier remedies. (*Hargrave's Co. Litt.* 142, note 2.) An infant cannot avail himself of his infancy to excuse the non-assertion of his rights under an executory agreement made with his ancestor, when the immediate performance of his part of the contract is essential to the interest of the other contracting party. (*Griffin v. Griffin*, 1 *Sch. & Lef. R.* 352. And *vide Marker v. Marker*, 41 *Eng. Ch. R.* 15.)

If lands are devised to trustees until debts are paid, and then to an infant and his heirs, and a stranger enters on the land, levies a fine, and five years and non-claim pass, and the infant, when of age, is barred of his action because the trustees ought to have entered, equity will relieve, and not suffer the infant to be barred by the laches of his trustees, nor to be barred of a trust estate during his infancy, and in such a case the infant will be permitted

to recover the mesne profits. (*Allen v. Sayer*, 2 *Vern. R.* 368.) But a fine and five years' non-claim will bar an infant *cestui que trust*, in favor of a purchaser. (*Lord v. Lady Huntingdon*, 3 *P. Wms. R.* 310 n. *Wyck v. East India Company*, *ib.* 309.)

If a stranger enters and receives the profits of an infant's estate, he will in equity be looked upon as a trustee for the infant. And if a man receive the profits of an infant's estate, and continues to do so for several years after the infant comes of age before any entry is made on him, he must account for the profits throughout, and not during the infancy only. (*Bing. on Inf.* 101, and cases cited.) But it has been ruled in chancery in England that when one receives the profits of an infant's estate, and six years after his coming of age he brings a bill for an account, that the statute of limitations is a bar to the suit, as it would be an action of account at common law; for the receipt of the profits of an infant's estate is not regarded such a trust as, being a creation of a court of equity, the statute will be no bar to, for he might have had his action of account at law: and hence there was no necessity that he should come into the court of chancery. The reason why such bills are brought in equity is, that the plaintiff may have the discovery of books, papers, and the party's oath, which they could not formerly do so well at law. But if the infant lies by for six years after he comes of age, as he is barred of his action of account at law, so he will be of his remedy in equity, and there seems to be no sort of difference in reason between the two cases. (*Lockey v. Lockey*, *Prec. Ch.* 518.)

§ 112. If a legacy be devised generally, and no time ascertained for the payment, and the legatee be an infant, the rule in England is, that he will be entitled to interest on the amount of the legacy from the expiration of the first year after the testator's death; a year being allowed before distribution can be compelled. But if the legatee be of age, he can only have interest from the time of his demand after the year, for, no time of payment being set, it is not payable but on demand, and he cannot have interest only from the time of his demand; the rule being otherwise as to an infant, because no laches is imputed to him. (*Small v. Dee*, 2 *Salk. R.* 416.) Though if an infant do not present to a church within the six months allowed in such cases, the church will lapse. If the five years for making a claim after a fine begin in the ancestor's life, the infant must claim within the five years, and he will be

barred in an appeal of the death of his ancestor, if he do not bring it within a year and a day. If the king die seized, the infant is driven to his petition, for in these cases the law prefers the good of the church, the repose of the realm, and the king's prerogative, before the privilege of infancy. (*Co. Litt.* 246.) Of course, laches, after the attainment of majority, bars an individual's claims in respect of what has been done or omitted during his infancy, though relief may, under peculiar circumstances, be given, notwithstanding laches after full age. (*McPherson on Inf.* 541.)

§ 113. By the common law, the statute of limitations will not run against an infant; and by the laws of England, any person entitled to bring any of the personal actions mentioned in the English statute of limitations, who is within the age of twenty-one years at the time the cause of action accrued, may bring such action within the time limited, after he shall have become of age, and the disability of infancy has terminated. (32 *Hen.* 8, *ch.* 2. 21 *James I.*, *ch.* 16.) But it is well settled that the statute of limitations will run against infants, except where they are specially exempted from its operation. "General words of a statute, it is considered, must receive a general construction; and unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment." (*Angell on Limitations*, § 194.) "And it was also declared by Sir Eardly Wilmot, in the House of Lords, that *infants*, like other persons, would be barred by an act for limiting suits at law, if there was no saving clause in their favor." (*Ib.*) The same doctrine is recognized by the authorities, both American and English. (*Bucklin v. Fond*, 5 *Barb. R.* 393. *Raynor v. Watford*, 2 *Dev. [N. C.] R.* 338. *Wyck v. East India Co.* 3 *P. Wms. R.* 309. *Beckford v. Wade*, 17 *Ves. Ch. R.* 87. *Demarest v. Wyncoop*, 3 *Johns. Ch. R.* 129.)

In the State of Massachusetts, the liability of heirs for the debts of an ancestor, depends wholly upon statute, and is provisional only; and such heirs are liable only in case of administration, and after the term of four years has expired, and then only for demands on which no cause of action accrued till after the lapse of four years, and in that case the action is required to be brought within one year of the payment if the demand could be enforced. Under this statute it was held that the fact of the plaintiff's having been under the disability of infancy, during the time that the estate of

the deceased was under administration, will not prevent his claim from being barred by the lapse of the four years. (*Hall v. Bumstead*, 20 *Pick. R.* 2.)

By the Revised Statutes, and Code of Procedure, of the State of New York, it is provided that no action can be maintained for the recovery of real property, or the possession thereof, unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within twenty years before the commencement of the action. (2 *R. S. part 3, ch. 4, tit. 1, § 5. Code of Procedure, § 78. 5 Stat. at Large, 23.*) Under this provision it has been held, that if an adverse possession commence in the life-time of the ancestor, it will continue to run against the heir, notwithstanding the infancy of the latter at the time the right accrues to him. (*Fleming v. Griswold*, 3 *Hill's R.* 85.)

§ 114. As a general thing, both in England and in the United States, infants are expressly exempted from the statute of limitations. Thus, in England, it is provided that where a party is an infant at the time the cause of action accrues for the recovery of any real estate, such party may bring his action at any time within ten years after coming of age. (21 *James I, ch. 16, § 2. 3 and 4 William IV, ch. 27, § 16.*)

In the State of Maine, if any person entitled to bring a personal action be an infant at the time his action accrues, he may bring his action within the time limited for bringing the action after he attains the age of twenty-one years; the time not to extend, however, over six months beyond full age. (*R. S. ch. 105, § 12.*) And in regard to real actions, the party has ten years to bring his action after coming of age. (*Ib. ch. 147, § 7.*)

In New Hampshire, if any party entitled to maintain an action for the recovery of real estate be within the age of twenty-one years at the time the action accrues, he may bring his action at any time within five years after he comes of age; and an infant may commence a personal action at any time within two years after arriving to the age of twenty-one years. (*R. S. ch. 181, §§ 2, 8.*)

In the State of Vermont, any person who is an infant at the time his cause of action accrues, may bring his action within the time limited after he comes of age. (*R. S. 1863, tit. 18, ch. 63, § 19.*)

In the State of Massachusetts, a person who is an infant at the time a real action accrues in his favor, may bring his action at any

time within five years after coming of age; and in case of personal actions, he may bring his action within the time limited after he attains the age of twenty-one years. (*Gen. Stat.* 1860, *ch.* 155, § 6.)

In Connecticut, an infant has five years after coming of age to bring a real action, four years after coming of age to bring an action on a bond or contract under seal or promissory note not negotiable, and three years after coming of age to bring his action of account, debt on book, simple contract, or of assumpsit founded upon implied contract, or upon any contract in writing, not under seal, except promissory notes not negotiable; and in regard to all other actions, infants do not seem to be exempted from the operation of the statute of limitations. (*R. S.* 1866, *tit.* 39, §§ 1, 2, 3¹.)

In the State of Rhode Island, infants may maintain a personal action within the time limited for prosecuting it after coming of age; and in actions for quieting possession and avoiding suits at law they have ten years after coming of age to bring their suit. (*Rev. Laws* 1844, *p.* 221, § 3.)

In the State of New York, if a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue within the age of twenty-one years, the time during which his infancy continues will not be deemed any portion of the time limited for the commencement of such action, or the making of such entry or defense; but the action may be commenced, or entry or defense made, after the period of twenty years limited, and within ten years after the infancy shall terminate, or after the death of the person entitled who may die during such infancy; and no action can be commenced, or entry made, after that period. (*Code of Procedure*, § 88. 5 *Stat. at Large*, 25.) In actions other than those for the recovery of real property, if the person entitled to bring the action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, within the age of twenty-one years, the time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended more than one year after the disability ceases. (*Code of Procedure*, § 101. 5 *Stat. at Large*, 28.) And it has been held that to entitle a person to the protection of this proviso in the statute of limitations

in favor of infants, the infancy and the bringing of the suit within the time limited after disability removed, must be specially pleaded. (*Hyde v. Stone*, 7 *Wend. R.* 354.) Infants are not exempt from the operation of the limitation in actions for a penalty or forfeiture, or against a sheriff or other officer for an escape; and no person can avail himself of a disability unless it existed when his right of action accrued. *Code of Pro.*, §§ 101, 106. 5 *Stat. at Large*, 29.)

§ 115. In the State of New Jersey, if any person having a right or title to lands, tenements, or other real estate, at the time such right or title first descended or accrued, shall be within the age of twenty-one years, then such person or his heirs may, notwithstanding the limitations provided, commence or sue forth his action within five years after his full age; and in respect to all other actions, the time during which a person may be an infant, or within the age of twenty-one years, will not be taken or computed as part of the time limited for the commencement of the action. (*R. S. of 1847*, ch. 8, § 4. *Digest of 1855*, p. 433, § 2; p. 435, § 10; p. 436, §§ 13-17; p. 438, § 24.)

In Pennsylvania, persons entitled to a personal action, who are within the age of twenty-one years at the time the cause of action accrued, are at liberty to bring their action within the period limited, after their coming to or being of full age, as other persons; and with respect to real actions, if the cause of action accrue while the person entitled to the action is within the age of twenty-one years, then such person and his heirs may bring his or their action at any time within ten years next after attaining full age, and no time after such ten years. (*Purdon's Dig. of 1861*, p. 659, §12; p. 656, § 19.)

In the State of Delaware, actions in respect to real property may be brought by any person who is an infant at the time the cause of action accrues, at any time within ten years after the disability of infancy has ended; and with regard to personal actions, if the person entitled to the action is under the disability of infancy at the time of the accruing of the cause of action the statute of limitations is no bar to the action during the continuance of the disability, nor until the expiration of three years from the removal thereof. (*Code of 1852*, tit. 18, ch. 122 § 9; ch. 123, § 13.)

In the State of Maryland, if the person entitled to an action, real or personal, be an infant at the time the cause of action accrue

he is at liberty to bring his action within the time limited after coming to or being of full age. (1 *Maryland Code*, art. 57, § 2.)

In the State of Virginia, an infant has ten years after coming of age to prosecute his action as to real property; and with respect to personal actions the statute of limitations does not run against an infant at all, but he is at liberty to bring his action within the period limited after coming to or being of full age, except that in no case can an action be brought after twenty years from the coming of age of the party. (*Revised Code*, 1849, tit. 45, ch. 149, §§ 3, 15.)

In North Carolina, the infant has three years after full age to prosecute a real action; and as to personal actions, except actions for penalties, the period of limitation does not operate at all against an infant. (*R. S.* 1855, ch. 65, § 9.)

In South Carolina, an infant has ten years after coming of age, to prosecute a real action; and it is further provided that the statute of limitations shall not defeat the rights of minors, unless the right of their ancestors was barred by the statute before the right accrued to the minor. (*Act of 1824. And vide Gibson v. Taylor*, 3 *McCord's R.* 451. *Rose v. Daniel*, 3 *Brev. R.* 438.) In the State of Georgia, an infant is not affected by the statute of limitations at all, but he has the full time to bring his action after coming of age. (*Cobb's Gen. Stat.* 1859, p. 206, § 397.)

In Florida, the statute of limitations in regard to real actions is extended ten years after an infant comes of age; and as to personal actions the statute does not run against infants at all. (*Thompson's Dig.* tit. 5, ch. 1, § 1, subd. 2, and § 2, subd. 1.)

In the State of Alabama, the time during which a person may be an infant is not to be taken or computed as a part of the time limited for bringing actions either real or personal, though the action must be brought within three years after full age. (*Code*, 1852, ch. 21, § 248.)

In the State of Mississippi, the statute of limitations does not run as to infants in any case. (*Allen and Van Hoesen's Dig.* 1839, ch. 73, § 7. *Hutchinson's Code.* 1848, ch. 57, § 7. In Louisiana, besides the prescription declared with respect to land, there is another of four years, which runs against a minor after he comes of age, as to any real estate alienated by the tutor in cases not prescribed by law; and it is provided further by the statute that minors cannot be prescribed against. (*Angell on Lim. App.* 113, 114. *Civ. Code of La.* art. 3488.)

In Tennessee, a person who is an infant at the time his cause of action accrues for the recovery of real estate, or for any other cause, has three years after coming of age to prosecute his suit. (*Comp. Laws* 1858, *ch.* 2, § 2757.)

In the State of Kentucky, real actions may be prosecuted by infants at any time within ten years after they come of age; and in personal actions, the statute does not run against minors at all. (2 *R. Such.* 63. *art.* 1 § 8, *art.* 4, § 2. *Machir v. May*, 4 *Bibb's R.* 43.)

In Missouri, infants have three years after coming of age to bring a real action, notwithstanding the statute of limitations; and as to personal actions the statute does not run against infants at all. (*R. S.* 1865, *ch.* 191, §§ 4, 14.)

In Arkansas, infants have five years to prosecute a real action after coming of age; and as to personal actions, infants are exempted from the operation of the statute. (*Dig.* 1858, *p.* 752, § 16.)

And in the State of Texas, minors are allowed two years after maturity to prosecute their claims to real estate; and in all other cases the statute of limitations does not run against them. (*Paschal's Annotated Dig.* 1866, *arts.* 4617, 4621.)

§ 116. In the State of Ohio, a person who is an infant at the time his action accrues for any real estate, may bring his action at any time within ten years after attaining full age; and the statute of limitations does not run against minors with respect to any other action, except for penalties and forfeitures. (2 *R. S.* 1860, *ch.* 87, § 19.)

In the State of Indiana, infants are not affected by the statute of limitations during infancy. (2 *R. S.* 1862, § 586.)

In the State of Illinois, the statute of limitations does not run against infants at all. (*Revised Laws* 1858, *p.* 746, § 7; *p.* 747, §§ 1, 2; *p.* 750, § 10; *p.* 752, § 14.) In Michigan, if the person first entitled to make entry upon lands or bring any action for the recovery thereof, shall die within the age of twenty-one years, and no judgment shall have passed against him with respect to such lands, the entry may be made or the action brought by his heirs or any person claiming from, by or under him at any time within ten years after his death, notwithstanding the twenty-five years' limitation prescribed by the statute may have expired; and with respect to personal actions, the statute does not run against minors at all. (2 *R. S.* *ch.* 165, § 6.)

In the State of Wisconsin, the statute of limitations as to infants, is extended, in all real actions, five years after they come of age, and, in personal actions, one year after they come of age, except that the statute runs against infants the same as to adults in actions for penalties and forfeitures, and against sheriffs. (*R. S.* 1858, *ch.* 138, §§ 13, 29.)

In the State of Iowa, the statute of limitations with respect to actions for the recovery of real property, does not apply to minors so far as to prevent them from having an action at least one year after attaining their majority, within which time they may commence such actions. (*Rev. Laws*, 1860, *ch.* 116, § 2747.) In California, if a person is an infant at the time he is entitled to make an entry upon lands, or bring his action for the recovery of real property, the time during which such disability continues will not be deemed any portion of the time in the act limited for the commencement of the action, or making his entry or defense, but the action may be commenced, or entry or defense made, within the period of five years after such person comes of age, or after his death, if he die while an infant; and in regard to all other actions, infancy is excluded from the time limited for the commencement of the action. (2 *Gen. Laws*, ¶¶ 4358, 4365.) In the State of Minnesota, it is provided that if any person entitled to bring an action for any cause, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, within the age of twenty-one years, the time of such disability is no part of the time limited for the commencement of the action, except that the period within which the action must be brought, cannot be extended more than one year after the infant becomes of age. (*Comp. Stat.* 1858, *ch.* 60, § 17.) In the new State of Nebraska, the statute of limitations does not run as to infants, except as to actions for a penalty or forfeiture. (*R. S.* 1866, *part* 2, *tit.* 2, § 17.) The law on this subject is the same in Kansas. (*Comp. Laws* 1862, *ch.* 26, § 26, *p.* 128.) In the State of Oregon, the statute of limitations does not run against infants, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, except that the time for bringing a personal action will not be extended by reason of such disability more than one year after the disability ceases. (*Gen. Laws* 1845, 1864. *Civ. Code*, *ch.* 1, § 17.)

§ 117. The general rule is that, if infancy is excepted in any respect by the statute of limitations, the fact of infancy and of bringing the action within the proper time after the disability expires, must be specially pleaded and the burden of proof is upon the party pleading it. (*Jackson v. Whitlock*, 1 *Johns. Cases*, 213. *Hyde v. Stone*, 7 *Wend. R.* 334. *St. John v. Turner*, 2 *Vern. Ch. R.* 419. *Calhoun v. Baird*, 3 *A. K. Marsh. [Ky.] R.* 169.)

In some of the American States adverse possession to a minor does not operate against his rights, and although the statute began to run against the ancestor, yet if the lands descend to an infant the statute stops running and the infant has the time allowed by law, to bring his action after arriving at full age. This, however, depends upon the provisions of the statute upon the subject; and such is the rule in Kentucky, Georgia and South Carolina, and some others of the states. (*Machir v. May*, 4 *Bibb's R.* 43. *Sentney v. Overton*, *Ib.* 445. *South v. Thomas*, 7 *Monroe's R.* 59. *Gibson v. Taylor*, 3 *McCord's [S. C.] R.* 451. *Cooke v. Wood*, 1 *ib.* 139. *Rose v. Daniel*, 3 *Brevard's [S. C.] R.* 438. *Irwin v. Morell, Dudley's [Geo.] R.* 72.) The rule is different in the State of New York, and in several others of the states. (*Jackson v. Moore*, 13 *Johns. R.* 513. *Fleming v. Griswold*, 3 *Hill's R.* 85.)

§ 118. The principle has long been established that the statute of limitations does not bar a trust estate, and that as between the trustee and *cestui que trust*, a trust cannot be reached by the statute of limitations. This doctrine was settled over fifty years ago in the English court of chancery, and seems to be admitted ever since. (*Cholmondeley v. Clinton*, 2 *Merivale's R.* 93.) The principle is recognized in this country, but both here and in England the doctrine holds good only in the case of a direct trust, and as between the *cestui que trust* and trustee; and not between the *cestui que trust* and trustee on the one side, and a third party on the other side. (*Earl of Huntingdon v. Countess of Huntingdon*, 3 *P. Wms. R.* 310. *Lyon v. Marclay*, 1 *Watt's [Pa.] R.* 275. *White v. White*, 1 *Md. Ch. Dec.* 53. *Thomas v. Brinsfield*, 7 *Geo. R.* 154. *But vide Payne v. Bullard*, 23 *Miss. R.* 88.) It is in this sense that we must understand the dictum of Sir J. Jekyll, master of the rolls in the English chancery, that the forbearance of trustees in not doing what it was their office to have done shall in no sort prejudice the *cestui que trust*. (*Lechmere v. Carlisle*, 3 *P. Wms. R.* 215.) Lord Somers once seems to have decided that an

infant *cestui que trust* cannot be barred by the laches of his trustee. (*Allen v. Sayer*, 2 *Vern. R.* 368.) Of course an infant is not any more than an adult, barred by lapse of time when his trustee has aliened to a person having notice of the trust. (*Vide Kenady v. Daly*, 1 *Sch. & Lef. R.* 379.)

In a learned and elaborate opinion of Chancellor Kent, in the late court of chancery of the State of New York, the principle is laid down, that the statute of limitations is a good plea in equity, as well as at law; that those trusts which are mere creatures of a court of equity are not within the statute of limitations; and that as long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statute of limitations does not apply; but if the trustee denies the right of his *cestui que trust*, and the possession of the property becomes *adverse*, lapse of time, from that period, may constitute a bar in equity; but other trusts, which are the ground of an action at law, are not exempted from the operation of the statute. (*Kane v. Bloodgood*, 1 *Johns. Ch. R.* 90.) And in a case in the English court of chancery, Lord Macclesfield expressed the opinion, "that when one receives the profits of an infant's estate, and, six years after his coming of age, he brings a bill for an account, the statute of limitations was a bar to such suit, as it would be to an action of account at common law; for this receipt of the profits of an infant's estate was not such a trust as, being a creature of a court of equity, the statute shall be no bar to, for he might have had his action of account at law, so shall he be of his remedy in this court; and there is no sort of difference in reason between the two cases." (*Lockey v. Lockey*, *Prec. in Ch.* 518.)

When an administrator in trust for an infant has a right to sue during infancy, and does not sue within the time prescribed by the statute of limitations, the infant is barred of his remedy against the debtor. (*Wyck v. East India Company*, 3 *P. Wms. R.* 309.) And if trustees appointed to protect the inheritance neglect their duty, and suffer an adverse possession of twenty years to be held, the statute of limitations is a bar to the *cestui que trust*. (*Pentland v. Stokes*, 2 *Ball & Beatty's R.* 68. *Hovenden v. Lord Annesley*, 2 *Sch. & Lef. R.* 607.) When the statute makes no saving or exception, the court of chancery will make none in favor of infants. (*Demarest v. Wyncoop*, 3 *Johns. Ch. R.* 146.)

It has been held in Vermont that the statute of limitations is not applicable to the account of a guardian against his ward while the

relation continues to exist; and that, after the relation terminates, lapse of time will not bar the guardian's claim when the delay is satisfactorily explained by the circumstances of the case. (*Kimball v. Ives*, 17 *Vt. R.* 430.) In Massachusetts, the statute will run against an infant whose claim is involved in the estate of a deceased under administration. (*Hall v. Bumstead*, 20 *Pick. R.* 2.)

§ 119. An infant cannot take advantage of his infancy to excuse the non-assertion of his right under an executory agreement, when an immediate assertion of his rights and performance of his part of the contract are essential to the interest of the other party. (*McPherson on Inf.* 541.)

An infant is bound by a judgment or decree, regularly entered against him, the same as a grown person; but he can dispute it as well as a grown person, on the ground of fraud, collusion or error. (*Ralston v. Lahee*, 8 *Clark's [Iowa] R.* 17. *Jeffrie v. Robedeaux*, 3 *Miss. R.* 33.) There can, however, be no valid decree against an infant by default, or on answer by guardian; but he must have a day in court, after he comes of age, to show error in the decree. But a decree of sale against an infant is valid. (*Mills v. Dennis*, 3 *Johns. Ch. R.* 367. *Thayer v. Lane*, *Walker's Ch. R.* 200. *Pope v. Lemaster*, 5 *Litt. [Ky.] R.* 77. *Beebe v. Bullitt*, 4 *Bibb's [Ky.] R.* 11. *Wilkinson's Admrs. v. Oliver's Rep's*, 4 *Hen. & Munf. [Va.] R.* 450. *Glaze v. Drayton*, 1 *Dessau. [S. C.] R.* 109, 125. *Wilkinson v. Wilkinson*, *Ib.* 201. *Harlen v. Barnes*, 5 *Dana's [Ky.] R.* 223. *Chalfant v. Monroe*, 3 *ib.* 35. *Harris v. Truman*, 1 *Hoff. Ch. R.* 178.)

An account taken before a master, upon the application of the executrix, when no suit is pending, is not binding on infant heirs; but if the father and guardian of the infants attended on their behalf, the account will be opened only to correct errors to be pointed out by them. (*Evertson v. Tappan*, 5 *Johns. Ch. R.* 511.)

An answer filed by an infant may be amended on motion when he attains full age. (*Winston v. Campbell*, 4 *Hen. & Munf. [Va.] R.* 477.)

Infants cannot be prejudiced by the misstatement or omissions of their guardian in his answer to a complaint filed against them. The court will give judgment according to the facts of the case. (*Lenox v. Notrebe*, 1 *Humph. [Tenn.] R.* 251. *James v. James*, 4 *Paige's Ch. R.* 115.) And the facts which will entitle the plaintiff to a judgment must be established against infants by legal proof.

Neither the guardian *ad litem*, or any other person, has power to waive this proof nor consent to a judgment without it. This is a rule of law which cannot be evaded; and the guardian's responsibility to the infant is no answer to the objection. (*Litchfield v. Roswell*, 5 *How. Pr. R.* 341, 345.)

The interest of an infant will not be affected by the recitals in a deed made during infancy, when an adult might be bound by them. (*Milner v. Harewood*, 18 *Ves. R.* 274.)

The court of chancery is guardian of infants, and will not allow them to be prejudiced by acts in their infancy, especially in transactions with the executors of their ancestors' estate. (*Stocto v. Stocto*, 1 *Dessau. [S. C.] R.* 201.) The court will protect the right of infants, when they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf. (*Stephens v. Van Buren*, 1 *Paige's Ch. R.* 479.)

In an action against an infant, nothing will be taken as admitted, but complete proof will be required. (*Tuttle v. Garnett*, 16 *Ill. R.* 354. *James v. James*, 4 *Paige's Ch. R.* 115. *Stephenson v. Stephenson*, 6 *Ib.* 353. *Hite v. Hite*, 2 *Rand. [Va.] R.* 409.)

In an action on a judgment recovered in another state, without actual notice to the defendant in the original suit, he may defend on the ground that the note on which the judgment was founded was given when he was an infant. (*Bartlet v. Knight*, 1 *Mass. R.* 401.)

The acts and admissions of a minor, relative to the subject-matter of a suit, are admissible in evidence against him. The infancy of the party may be shown to obviate their effect, and the weight to be attached to them must depend upon the circumstances of the case. (*Hamblett v. Hamblett*, 6 *N. H. R.* 333.)

An infant defendant may take any objection, on the hearing, to the relief sought, whether the objection was apparent on the bill or came out in the testimony. An infant in this respect is favored above that of an adult. (*Jones v. St. John*, 4 *Sand. Ch. R.* 208.) Though an infant defendant consent to be examined as a witness for a co-defendant, if his testimony is against his own interest, the court will suppress the deposition. (*Moore v. Moore*, 4 *Sand. Ch. R.* 37.)

§ 120. A decree uprooting a valid trust for infants, upon the ground of a purchase of the land by the complainant, in good faith, and without notice of the trust, is erroneous if it do not give them

a day in court after coming of age; and the error may be corrected either by original bill or bill of review. (*Wright v. Miller*, 1 *Sand. Ch. R.* 103. *S. C.* 4 *Seld. R.* 9.) However, an infant who has a day given him, after he comes of age, to show cause against a decree, cannot assail the decree in any mode he pleases by that day, but must first obtain the leave and direction of the court in the premises. (*Field v. Williamson*, 4 *Sand. Ch. R.* 613.)

In case of partition of real estate, when actual partition is made, the infant defendant may, under certain circumstances, come in after his majority and have the decree opened. But if the land is sold, he has no such privilege, if the judgment ordering the sale was regular, but his right is cut off by the decree and sale, and he is concluded. (*Vide Farran v. Sherwood*, 17 *N. Y. R.* 227.) But infant owners will be relieved by a resale when their property has been sacrificed through the misapprehension or negligence of their natural or statutory guardians, on condition that a full indemnity is offered to the purchaser. And whenever, in a suit or proceeding in the supreme court, or in any court of equity, the fact appears that the rights of infant parties have been invaded, or are in danger of being prejudiced, the court ought, without waiting to be specially invoked to do so, to exercise its protective jurisdiction in behalf of such infant parties. Although no application for a resale is made in behalf of infants, yet such an order may be made on the court's own motion, in its capacity of universal guardian to all infants, and by virtue of its obligation to exercise a general superintendence and protective jurisdiction over their persons and property. (*Lefevre v. Laranway*, 22 *Barb. R.* 167.)

CHAPTER XI.

FOR WHAT AN INFANT IS LIABLE—WHEN LIABLE CIVILLY—WHEN CRIMINALLY—THE RULE IN SUCH CASES.

§ 121. AN infant may be intrusted with certain offices, and it follows as a legitimate result that he must be liable to the consequences of his acts in the exercise of those offices. This is especially the rule when the office held by the infant is of a public

nature. An infant, as we have seen, may act as a jailer (*ante*, § 78), and if, while he is keeper of the jail, he should let a prisoner escape out of execution, he would be liable to an action for the damage, the same as an adult. (*Vide King v. Dilliston*, 3 *Mod. R.* 222.) So an infant will be liable civilly for his negligence in any office which he may legally hold. Should he be permitted, however, to hold an office of pecuniary trust, and be guilty of negligence with respect to the moneys placed in his hands, those to whom the money belongs would have no remedy, unless the infant officer should be proved guilty of a tortious conversion of the money. This is assigned as a reason why an infant cannot hold an office of pecuniary trust, or where it is a part of the duty of the incumbent to receive money. (*Claridge v. Evelyn*, 5 *Barnw. & Ald. R.* 81.) We have seen that an office in a parkship may be given or descend to an infant (*ante*, § 78); but if the condition in law annexed to the office, which is skill, be not observed, the office is forfeited. (*King v. Dilliston*, *supra*. *Stowel v. Zouch*, *Plowdon's R.* 375.) And we have seen that in some instances an infant may administer at seventeen, but he cannot commit a "*devastavit*" until he is twenty-one. (*Vide Whitmore v. Weld*, 1 *Vern. R.* 328.) But an infant executor or administrator would be liable for a fraudulent execution of his trust. (*Loop v. Loop*, 1 *Vt. R.* 177.)

§ 122. In all cases where an infant is allowed to make a binding contract, or perform a valid act, he is liable to an action for non-performance or default, the same as an adult. Thus, an infant may make a valid contract for necessities, and having contracted for them, he may be sued for their value. So an infant is liable to an action upon his recognizance to appear and answer a criminal charge, and upon any other bond or obligation required of him by law. So, also, if a minor take a lease of land, and enter and continue in possession of the claim by rent, he is liable to the same process and to the same action as an adult to enforce his contract for rent. (*Newry & Enniskillen Railway v. Coombe*, 3 *Exch. R.* 569. *Northwestern Railway v. McMichael*, 5 *ib.* 126.) If he wishes to exonerate himself from the obligation to pay rent, all he has to do is, to disclaim, which, it seems, he may do at any time before the rent day comes, and be relieved from liability for the past occupation. (*Ib.*)

In an action against an adult for the use of lands occupied by him during minority, decided by the English court a hundred

years ago, Yates, Justice, said: "If the defendant was still an infant, I should think this action maintainable. Debt, perhaps, would not lie, because an infant cannot wage his law; but assumpsit, I think, would lie, as the infant continued to occupy and enjoy the estate. In *Kirten v. Elliott*, (2 *Bulst. R.* 69,) the plaintiff recovered against an infant the rent upon a lease made to him; and it is there said, 'if a lease be made to an infant, and he occupies and enjoys, he shall be charged with the rent.'" (*Evelyn v. Chichester*, 3 *Burr. R.* 1719.) This was under the old copyhold system, but the principle is recognized at the present day. In all cases where the law absolutely requires of an infant any duty or act, the same may be enforced against the infant by the same process as against an adult. And whenever any disability, enacted by the common law, is removed by the enactment of a statute, the competency of an infant to do all acts within the purview of such statute is as complete as that of a person of full age, and, of course, in such a case, the infant is liable in the same manner as an adult. (*United States v. Bainbridge*, 1 *Mason's R.* 71.)

It seems that if an infant enter into a contract for the sale or purchase of an estate, or for any other purpose, he cannot enforce it in equity, nor can it be enforced against him, for the reason that it is not mutual. (*Copes v. Hutton*, 2 *Russ. R.* 357. *Flight v. Bolland*, 4 *ib.* 298.)

§ 123. The privilege of infancy is purely protective, and infants are liable for torts and injuries of a private nature, and for all wrongs committed by them, the same as adults. If the tort be committed with force, the infant is liable at any age, for in case of civil injuries with force, the intention is not regarded, for, in such a case, a lunatic is as liable to compensate in damages as a man in his right mind. (*Reeves' Dom. Rel.* 256. *Baxter v. Brush*, 29 *Vt. R.* 465. *Scott v. Watson*, 46 *Maine R.* 362.) The act, however, must be wholly tortious, in order to charge the infant; and it is well settled that a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort, in order to charge the infant in trover or case, by a change in the form of the action. (*Jennings v. Rundell*, 8 *Term R.* 337. *West v. Moore*, 14 *Vt. R.* 447. *Merrill v. Aden*, 19 *ib.* 505. *Brown v. Durham*, 1 *Root's R.* 273. *The People v. Kendall*, 25 *Wend. R.* 399.) When the injury complained of happened through the unskillfulness, want of knowledge,

discretion and judgment of the party, infancy will be a bar to the action. (*Campbell v. Stokes*, 2 *Wend. R.* 137.)

If an infant be trusted with personal property, for the purpose of transportation from one place to another, and neglects to perform his contract, but consumes or wastes the goods, he is not liable on his contract, under a plea of infancy, but an action will be sustained against him for the wrong in consuming and wasting the property. (*Furnis v. Smith*, 1 *Roll. Abr.* 530.) So if an infant receive the goods of another, for the purpose of conferring labor upon them (the fact of infancy being unknown to the bailor), and subsequently refuses to return them on demand, he is liable to an action of detinue or trover for the conversion. (*Mills v. Graham*, 1 *New. R.* [4 *Bos. & Pull.*] 140.) In this last case, Sir James Mansfield, Chief Justice, remarked that the defendant "fraudulently received the goods, concealing the circumstances of his minority, and then set up his minority as a defense against the plaintiff's just demand. The goods being wrongfully in the defendant's hands from the beginning, without any valid contract between him and the plaintiff, it seems that they must be considered in the same situation as if the defendant had, at first, wrongfully gotten possession of them without pretense of bailment." And, in conclusion, "it is sufficient to say, that the goods did not come to the defendant under what could properly be called a bailment. They came into his hands by fraud, and the right of the plaintiff must be considered just the same as if the goods had come to the defendant's hands without pretense of right on delivery." An infant is liable for money received by him as an apprentice, which he embezzles or misapplies, and this, even, in an action in form *ex contractu*, it being, in substance, an action *ex delictu*, and the same rule of law applies. (*Bristow v. Eastman*, 1 *Esp. R.* 172.)

§ 124. When personal property is committed to an infant as supercargo, and through his carelessness and negligence the property is wasted, and the infant willfully disobeys instructions with respect to the property, by which the owner sustains damage, the owner has an action against the infant for the tort, though not upon the contract for a breach of instructions. (*Vasse v. Smith*, 6 *Cranch. R.* 226, 239.) Still, the plaintiff will not be permitted to vary the liability of the infant to the prejudice of the latter, by varying the form of his action; and if the transaction between the parties

was really a contract, the plaintiff cannot proceed upon it as for a tort. Thus it has been held that, when goods are delivered to an infant on a contract, by a man who knows of the infancy, the infant cannot be charged for the goods in trover and conversion. (*Manley v. Scott*, 1 *Sid. R.* 129.) But this is otherwise when there has been willful misconduct and breach of trust on the part of the infant, and when he fills a situation of confidence. (*Vide Furnis v. Smith*, 1 *Roll. Abr.* 530. *Bristow v. Eastman*, 1 *Esp. R.* 172.)

Infancy is a good defense to an action of assumpsit on the warranty of a horse, for the warranty is, in fact, an *undertaking* that the horse is sound, and it is said that the plaintiff does not make the case stronger by declaring in tort, and alleging deceit practiced in the course of the contract. (*Howlett v. Haswell*, 4 *Camp. R.* 118. *Geeen v. Greenbank*, 2 *Marshall*, 485. 4 *Eng. C. L. R.* 496.) But in the State of South Carolina it has been held that infancy was no defense to an action *ex delicto*, for a false warranty in the sale of a horse. (*Wood v. Vance*, 1 *Nott & McCord's R.* 197. An infant receiving property as bailee is protected if he keeps within the terms of the bailment; but if he departs from the terms under which he receives the property he is liable to an action as for the conversion of the property. (*Town v. Wiley*, 23 *Vt. R.* 355.) Of course an action of trover will lie against an infant for taking property wrongfully, or for converting property bailed to him. (*Jervis v. Littlefield*, 15 *Maine R.* 233. *Green v. Sperry*, 16 *Vt. R.* 390.)

It has been held in the State of New York, that an act of exploding fire-crackers by an infant, in the public streets of a city, is wrongful and unlawful; and that if any damage to the persons of individuals, or to property, animate or inanimate, results therefrom, the wrongdoer is liable to compensate the sufferer, upon the principle that in an action *ex delicto*, for an injury to the plaintiff's property occasioned by the wrongful act of the defendant, the infancy of the defendant is no protection. He is as fully liable for the damages sustained as if he were of full age. (*Conklin v. Thompson*, 29 *Barb. R.* 218.)

§ 125. In the State of Massachusetts, it has been decided that an infant who hires a horse to go to a place agreed on, but goes to another place in a different direction, is liable in trover, for an unlawful conversion of the horse, in the same manner that an adult would be liable under the same circumstances. (*Homer v. Thwing*,

3 *Pick. R.* 492.) And in a late case in the superior court of the city of New York, the same doctrine is reiterated, wherein it was held that when a person hires a horse to go a fixed distance, and goes beyond it, the act is, in judgment of law, a dispossession of the owner and a conversion of the property to his own use; and that, therefore, when an action for damages is brought by the owner, as it is founded, not upon a breach of the contract of hiring, but upon the unlawful conversion, infancy is no defense. (*Fish v. Ferris*, 5 *Duer's R.* 49.)

In another case in the late court of errors of the State of New York, where it appeared that an infant took a mare and drove her with such violence and otherwise cruelly treated the animal, as that she died, it was held, that though *case* would not lie, *trespass* might be maintained against him; and the doctrine was laid down that if an infant who has a horse on hire does any willful and positive act amounting to an election on his part to disaffirm the contract of hiring, the owner is entitled to the immediate possession; and that if the infant willfully and intentionally injures the animal, an action of trespass lies against him for the tort. (*Campbell v. Stokes*, 2 *Wend. R.* 137.)

But it has been held in the State of Pennsylvania, that an infant is not liable in any way for a constructive tort or conversion, in driving a hired horse elsewhere than the contract allowed, or managing him negligently or unskillfully. (*Penrose v. Curren*, 3 *Rawle's R.* 351. *Wilt v. Walsh*, 6 *Watts R.* 9.)

An infant is liable to an action for his acts, by virtue of an office, which by statute he is forbidden to hold, although he may have been regularly elected. In such a case, he may be an officer *de facto*, so that his acts would be binding upon third persons, in order to prevent the mischief to such as confide in him; but the office would be void as to the officer himself, though valid as to strangers. (*Green v. Burke*, 23 *Wend. R.* 490, 502. *Riddle v. Bedford*, 7 *Serg. & Rawle's R.* 386, 392. *Parker v. Luffborough*, 10 *ib.* 249. *Keyser v. McKissan*, 2 *ib.* 139, 140.)

In the court of common pleas of the city of New York, it has been held that a minor who obtains property upon representations that he is of full age, is liable in an action of tort, either to recover the property back or to recover damages upon the ground that it was wrongfully obtained. (*Eckstein v. Franks*, 1 *Daily's R.* 334.)

A similar doctrine was enunciated by the supreme judicial court of the commonwealth of Massachusetts, fifty years ago; and Putman, J., in delivering the opinion of the court said: "The goods were delivered by the plaintiff to Rand, because he undertook to pay for them, and declared that he was of age. The basis of this contract has failed, from the fault if not the fraud of the infant, and, on that ground, the property may be considered as never having passed from or as having revested in the plaintiff. It is said in *Pothier*, 1, 13, 'If, with the intention of giving or lending a thing to *Peter*, I give or lend it to *Paul*, whom I mistake for *Peter*, the gift or loan is void for want of my consent. The plaintiff supposed that he was dealing with a man of full age, and not with an infant; and the fraud, which induced the contract, furnishes the ground for the impeachment of it.'" (*Badger v. Phinney*, 13 *Mass. R.* 345.)

It is the clear and well settled rule in equity, that in cases of fraud, infancy cannot be pleaded in defense; and in America there is a strong current of authority in favor of the equity doctrine, that if an infant be guilty of fraud, or fraudulently conceal his age, and thereby obtain money or goods, he is liable for the same. (*Story on Con.* § 66, note 1; and *vide Stoolfoos v. Jenkins*, 12 *Serg. & Rawle's R.* 339.) Such acts of an infant, however, as are only voidable, are allowed in equity to be confirmed, but not such as are actually void. A warrant of attorney is of the latter description, which the court cannot make good, though there appear circumstances of fraud on the part of the infant. (*Saunderson v. Marr*, 1 *H. Bl. R.* 75.) And in Connecticut it has been held that a minor is not liable in equity for fraud in a contract, any more than at law. (*Geer v. Hovey*, 1 *Root's R.* 179.) Mr. Story, in his excellent work on contracts, says: "If the infant have been guilty of positive fraud, and thereby imposed upon the other party to his injury, he cannot set up his infancy as a defense to an action for the consideration, although the matter be in contract; for by his fraud he has put himself without the pale of his privilege, and is responsible to the same extent as if he were an adult. Fraud renders a contract void *ab initio*, and not voidable; and if an infant, by fraudulent representations, therefore, deceive the other party, and thereby induce him to part with his goods, such an agreement will be utterly void, and the infant will be liable in an action of trover for conversion." (*Story on Con.* § 66.)

§ 126. It has been held in England, contrary to the doctrine of some of the American decisions, that an action does not lie against an infant for obtaining a loan by representing himself to be of full age; because the affirmation, being by an infant, was void. (*Johnson v. Pie*, 1 *Levinz R.* 169. 1 *Kib. R.* 905, 913. *Price v. Hewitt*, 18 *Eng. L. & Eq. R.* 522, 524.)

In the supreme court of the State of New Hampshire, a distinction is suggested, that an infant is not liable in case for any fraudulent affirmation that makes a part of the contract, as for a fraudulent representation as to the quality of goods; but that for fraudulent representations anterior or subsequent to the contract, and not parcel of it, he is liable. Upon this principle it was decided that for an affirmation that he is of age, by which a contract is afterward made with him, an infant is liable in case. (*Fitts v. Hall*, 9 *N. H. R.* 441.) This doctrine would seem to be more fictitious than real, and the case is decidedly condemned in American Leading Cases, where the learned editors say: "This decision, which directly overrules *Johnson v. Pie*, 1 *Levinz.* 169, is clearly unsound. The representation by itself was not actionable, for it was not an injury, and the avoidance of the contract, which alone made it so, was the exercise of a perfect legal right on the part of the infant. The contract in such a case as *Fitts v. Hall* forms an essential part of the right of action, and no liability growing out of contract can be asserted against an infant. The test of an action against an infant is, whether a liability can be made out without taking notice of the contract. It is admitted in the same court that such an affirmation as in *Fitts v. Hall* does not estop the infant so as to render him liable on the contract (*Burley v. Russell*, 10 *N. H. R.* 184), which implies that the avoidance of a contract induced by such a representation, is not a *fraud*." (1 *Am. Lead. Cas.* 118.) This reasoning certainly appears plausible, and is in substance sustained by the superior court of the city of New York, in a case decided in 1851, in which it was held: "It is settled law, that no action as for a deceit, can be maintained against an infant, even when he has attained his age, grounded upon a false representation of his age." Judge Sandford, in pronouncing the opinion of the court, said: "We believe the law remains as it was laid down in *Johnson v. Pie*, 1 *Kib.* 905, 913 (*S. U.* on its first argument in 1 *Lev.* 169), which was an action on the case for a fraudulent representation by the defendant that

he was of full age, whereby he induced the plaintiff to lend him money on a mortgage, when, in fact, he was only twenty years and six months old; and he afterward avoided the mortgage for infancy. After a verdict for the plaintiff, judgment was arrested, on the ground that the action could not be maintained for such a false statement, made by an infant. It is stated in that case that the same point was held the previous term, in the case of *Grove v. Nevil*. These decisions have remained the law of England to the present day (*McPherson on Inf.* 482), and we are disposed to acquiesce in them as well adapted to maintain the protection which the common law has thrown around infants." (*Brown v. McCune*, 5 Sand. R. 224.) It had, however, been held by the supreme court of the State of New York, some eight years before the case of *Brown v. McCune* was decided, that "an infant who fraudulently obtains goods upon credit, with an intention not to pay for them, is liable in tort to the party injured." The representation by the infant was, that he was a person fit to be trusted, and he fraudulently concealed the fact that he was an infant; and Judge Cowen argued that the infant was liable, both in principle and authority. (*Wallace v. Morss*, 5 Hill's R. 391.)

The same doctrine has been recognized in several other American cases, and the opposite rule which was laid down in *Johnson v. Pie*, 1 Kib. R. 905, and in *Brown v. McCune*, *supra*, may be regarded as overruled by an overwhelming weight of authority. (*Vide Kilgroe v. Jordan*, 17 Tex. R. 349. *Norris v. Vance*, 3 Rich. R. 164. *Pergin v. Sutchliffe*, 4 McCord's Ch. R. 387.) Says Lord Chancellor Cowper: "If an infant is old and cunning enough to contrive and carry out a fraud, he ought to make satisfaction for it." (2 Eq. Ca. Abr. 515.)

It has been held by the supreme judicial court of Massachusetts, that an infant who prevails, on the plea of infancy, in an action on a promissory note given by him for a chattel which he had fraudulently obtained, on his refusal to deliver the chattel on demand, is liable to an action of tort for the conversion of the chattel, although he had sold it before the demand was made upon him. (*Walker v. Davis*, 1 Gray's R. 506.) In this case a minor got an old man, eighty-five years old, drunk, and then bought his cow of him, and gave him his note for the purchase price, which he defeated by his plea of infancy. The sale might have been avoided by the old man on account of the fraud, and his intoxication when

he made the sale, and the minor, having nullified the sale, was made liable for the conversion of the property, which was right.

Judge Reeves, in his remarks upon the law of "Parent and Child," says: "It is laid down as a rule in the elementary writers, that an infant cannot be liable for his fraud in a contract, in a civil action; and several authorities are cited to prove this position. It seems to me, that this position is destitute of principle. Infants are not liable for their contracts, but may be for their torts. The contract, and the fraud in a contract, are very distinct things; on the first he would not be liable, but I cannot conceive of any reason why an infant, who *doli capax*, and commits an injury by practicing fraud, should not be liable to compensate in damages the person injured." (*Reeve's Dom. Rel.* 259.)

Whether the mere silence of the infant, as to his age, knowing that the other party believe him an adult, would render him liable for goods purchased and converted by him, does not seem to be conclusively settled, although the better opinion is that he would not be liable, if he neither does nor says any thing to induce the belief that he is of full age. It has been held, that, in the absence of any positive misrepresentation, the mere omission of the infant to disclose his infancy, was not such a fraud as would invalidate the contract. (*Stillman v. Dawson*, 1 *De Gex & Smale's Ch. R.* 90.) But if a minor purchase property, knowing that the seller believed him to be of full age, and then set up his infancy to avoid payment of the purchase-money, the vendor can reclaim the property if it be still in the possession of the infant. (*Vide* 20 *Am. Jur.* 265.)

§ 127. Infants are liable to an action for personal injuries and assaults, in the same manner as adults. When the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer; and the only difference between an infant and an adult in such a case is, that an injury might probably be considered an unavoidable accident in the case of infants which would not be so considered in the case of adults. (*Bullock v. Babcock*, 3 *Wend. R.* 391.)

An infant is liable in an action of trespass for having procured another to commit an assault and battery; so held by the supreme judicial court of Massachusetts, upon the principle that all persons aiding and abetting, or counseling and procuring a trespass to be done, are principals, whether present or not. (*Sikes v. Johnson*, 16

Mass. R. 389.) But Mr. Chitty, in his work on pleadings, lays it down, upon the authority of Lord Coke, that an infant cannot be a trespasser by prior or subsequent assent, but only by his own act (1 *Chitty on Plead.* 7 *Am. ed.* 86); and in Bacon's Abridgment it is said, that an infant cannot be guilty of a forcible entry and detainer by barely commanding one, or assenting to one to his use, because every such command or assent by a person under such an incapacity as infancy is void. (*Bac. Abr. tit. Inf. H.*)

An infant is liable in an action of slander in the same cases as adults, though not until he is *doli capax*, "capable of mischief," that is, having knowledge of right and wrong. At the age of fourteen he is, in presumption of law, *doli capax*, and at that age, therefore, he would probably be liable in an action of slander. (*Reeve's Dom. Rel.* 259.)

An action of ejectment may be maintained against an infant. (*McCoon v. Smith*, 3 *Hill's R.* 147.) An infant is also liable for continuing a malicious prosecution after attaining his majority commenced during infancy. (*Stirling v. Adams*, 3 *Day's R.* 411.)

An infant is not chargeable in all cases for wrongs done by him. Thus, an infant executor cannot commit a devastavit; and when letters of administration were granted to an infant, under which she received and disposed of the assets of the intestate, it was held that an account could not be directed of her receipts during her infancy. (*Vide Whitmore v. Wild*, 1 *Vern. R.* 328. *Russell's Case*, 5 *Coke's R.* 37 a. *Hindmarsh v. Southgate*, 3 *Russ. R.* 324. *Smalley v. Smalley*, 1 *Eq. Cas. Abr.* 6.)

An infant cannot be made responsible for the negligence of one acting as his agent or servant. A person capable in law of being a principal or master renders himself liable for the want of skill or care of his agent or servant, the relation of such persons being upon the principle of *agency*. An infant, however, is incapable in law of appointing an agent, and as he cannot create an agency, he cannot appoint a servant, and, therefore, cannot delegate powers to another; nor can he guarantee or insure the fidelity, care or skill of such other. Such legal incapacity, however, does not exempt him from the consequences of his *tortious* acts. In respect to those, he is responsible, if *doli capax* when the wrong is done. But such tortious acts must be committed by the infant *himself*, or under his immediate view, or by his direction or authority. He cannot be a trespasser by prior or subsequent assent, but only *for his own act*.

He is not responsible even for his own act, if it occurs through his unskillfulness and want of knowledge, discretion, or judgment. On these principles an infant devisee is not liable for damages caused by an imperfect fixture upon his estate erected by his ancestor and devisor, though happening to the tenant of the infant after the estate comes into his possession. (*Robbins v. Mount*, 33 *How. Pr. R.* 24.)

An infant is not liable by the custom of the realm for the loss of goods committed to his care as an innkeeper. (*Crosse v. Androes*, 1 *Roll. Abr.* 2.)

§ 128. If, through the negligence of an adult, it happens that an injury is done, without malice, by an infant, the adult, and perhaps also the infant, is civilly liable to the person injured. Thus, when a man sent for a loaded gun, desiring that the person who was to deliver it should take out the priming, which he did; the gun, after being delivered, went off by the imprudent act of the child, and wounded a bystander; the man who sent for the gun was held liable for the damage. (*Dixon v. Bell*, 5 *Maule & Selwyn's R.* 198.)

It is proper to remark that in all actions in which an infant is liable, the cause of action may be proved in the same manner, and by the same species of evidence, as in actions against an adult. Thus, the confessions of an infant are admissible against him, the same as though he were of age. (*Mather v. Clark*, 2 *Aik. R.* 209. *Haile v. Lillie*, 3 *Hill's R.* 149. *But vide Lumlay v. Thomas*, 26 *Geo. R.* 537.) An infant's confession, however, should be received more cautiously on account of his age. (*State v. Guild*, 5 *Halst. R.* 189, 190.)

So the remedies against infants, when they are liable, are the same as against adults. Thus, in an action of assumpsit against an infant for money tortiously taken by him, a debt due to him may be attached by trustee process, under the statutes of Vermont (*Elwell v. Martin*, 32 *Vt. R.* 217); and an infant may be taken in execution on a judgment against him in the same cases, as in those of adults. (*Dow v. Clark*, 1 *Crompt. & Mees. R.* 860.)

The court has no jurisdiction to discharge from custody an infant in execution for damages in an action of slander. The same rule prevails in this respect, both with infants and adults. (*Defries v. Davis*, 27 *Eng. C. L. R.* 822.)

It may be proper to suggest that the plea of infancy, when justified by the fact, is honorable and proper, and not discouraged by

the courts. (*Delafield v. Tanner*, 1 Eng. C. L. R. 436.) But when an action is brought against an infant to recover a fair demand, and infancy is pleaded as the only defense, the plaintiff will be permitted to discontinue without the payment of costs. (*Van Buren v. Font*, 4 Wend. R. 209.)

§ 129. Infants who have attained the years of discretion, are regarded in law as capable of committing crimes as adults and after that period they may be prosecuted and punished for criminal offenses of which they are guilty. What the age of discretion is, in various nations, is matter of some variety. The civil law distinguished minors, or those under twenty-five years old, into three stages; *infantia*, from birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upward. The period of *pueritia*, or childhood, was again subdivided into two equal parts; from seven to ten and a half *aetas infantiae proxima*; from ten and a half to fourteen was *aetas pubertati proxima*. During the first stage of infancy, and the next half stage of childhood, *infantiae proxima*, they were not punishable for any crime. During the other half stage of childhood, approaching to puberty, from ten and a half to fourteen, they were indeed punishable if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigor of the law. During the last stage, at the age of puberty and afterward, minors were liable to be punished, as well capitally, as otherwise. (4 Black. Com., 22.)

By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open; and from thence till the offender was fourteen, it was *aetas pubertati proxima*, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion; but under twelve it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. (4 Black. Com. 23.) But as the law now stands, both in this country and in England, the capacity of doing ill or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For, one lad at ten years old may have as much cunning as another of fourteen; and in these cases the maxim is, that "*malitia supplet aetatem*"—"malice supplies the want of age." Up to the age of

seven, however, the law considers a child not possessed of sufficient reason to be accountable or answerable for his acts; and in Hungary, it is said that the date of the birth of the child runs from the date of baptism. The absurdity of this fiction was illustrated in 1866, in a case which occurred in the neighborhood of Presburg, in which a woman was charged with being the receiver of stolen goods. She had been, up to within the six months previous, a Jewess, when she was converted by a priest of the church of Rome. Therefore, the woman, on her trial, made the ingenious plea that she was an infant, not come to the years of discretion, and could not be legally convicted. The tribunal held her defense to be a good one, and acquitted her!

§ 129*a*. But the more sensible practice, as before suggested, has been adopted in most civilized countries, not to look so much to the age of the delinquent as to his strength of understanding and judgment; and yet it is a general rule that infants, who have not arrived to seven years of age, cannot be punished as criminals, for before that age they are not supposed to have a will that can concur with a forbidden act, in contemplation of law, and it is only from the age of fourteen that the law holds a person entirely responsible. Under that age infants are *prima facie* considered unacquainted with guilt, and incapable of crime; and the fact of guilty knowledge of the prisoner must be distinctly made out by the prosecution. (*Rex v. Owen*, 19 *Eng. C. L. R.* 493. *Commonwealth v. McKeagy*, 1 *Ashmead's [Pa.] R.* 248. *State v. Aaron*, 1 *Southard's [N. J.] R.* 231. *State v. Doherty*, 2 *Overton's [Tenn.] R.* 80.) This rule is especially observed and adhered to in capital cases. An infant of tender years cannot be guilty of murder, and when under seven years he will be excused from the guilt and punishment of felony, whatever circumstances proving discretion may appear, for, *ex presumptione juris*,—on account of the presumption of right, he cannot have discretion, and no averment must be received against that presumption. But, if above seven, and under fourteen, years of age, though *prima facie* not guilty, yet if it appear, by strong circumstances and pregnant evidence, that he had discretion to judge between good and evil, judgment of death, even may be given against him. (*Reniger v. Fogossa*, *Plowdon's R.* 19, *note f.*) In such cases the intellectual capacity of the child may be proved by the testimony of witnesses. (*State v. Aaron*, *supra*.) But herein the circumstances must be inquired of by the

jury, and, according to the English cases, the infant is not to be convicted upon his confession; although, in the State of New Jersey, a boy of the age of twelve years and five months was convicted, on his own confession, of the crime of murder and executed. (*State v. Guild*, 5 *Halstead's R.* 163.) If an infant be indicted under the age of fourteen, and put upon his trial, the petit jury may either find him generally not guilty, or they may find the matter specially that he committed the fact, but that he was under the age of fourteen, *scilicet ætatis*, 13 *annorum*, and had not discretion to discern between good and evil; *et non per feloniam*. (*Bing. on Inf.* 115.)

With regard to capital crimes the law is, very properly, more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion, than in cases of inferior grade; but if it appear to the court and jury that the offender was *doli capax*, and could discern between good and evil when he committed the offense, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress; and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death. and he of ten years actually hanged, because it appeared on the trials that the one hid himself, and the other hid the body he had killed, which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil; and there is an instance, in the seventeenth century, where a boy of eight years old was tried in England for firing two barns; and it appearing that he had malice, revenge and cunning, he was found guilty, condemned and executed. Thus, also, in the eighteenth century, in England, a boy of ten years old was convicted, on his own confession, of murdering his bed-fellow, there appearing in his whole behavior plain tokens of a mischievous discretion; and, as the sparing this boy, merely on account of his tender years, might be of dangerous consequence to the public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by the judges that he was a proper subject of capital punishment. (4 *Black. Com.* 23, 24.) In the case of rape, the law presumes that an infant under the age of fourteen years is unable to commit the crime, and, therefore, it seems, at common law, he cannot be guilty of it; but this is upon the ground of impotency, rather than the want of discretion, for he may be a principal, in the second degree,

by aiding and assisting in this offense, as well as in other felonies, if it appear, by sufficient circumstances, that he had a mischievous intent. (1 *Hale's R.* 630.) Although, at common law, a person under fourteen years of age is conclusively presumed incapable of committing rape, yet, in this country, since males often arrive at puberty at an earlier age, the presumption is not conclusive, and may be rebutted by competent evidence. (*The People v. Randolph*, 2 *Parker's Cr. R.* 174.) Without proof of puberty, in such a case, the infant can only be convicted of a simple assault and battery. (*Ib.* Vide also *Commonwealth v. Lanigan*, 2 *Law R.* 49.) And in Massachusetts and Ohio it has been held that an infant under fourteen may be indicted for an assault with intent to commit a rape. (*Commonwealth v. Green*, 2 *Pick. R.* 380. *Williams v. The State*, 14 *Ohio R.* 222.) But it seems that such indictment will not be sustained in England. (*Eldershaw's case*, 14 *Eng. C. L. R.* 367. *Phillips' case*, 34 *ib.* 610. *Jordan's case*, 38 *ib.* 63.) Nor in New York. (*The People v. Randolph*, *supra.*)

§ 130. When an act is made felony or treason by a statute, it extends as well to infants if above the age of fourteen, as to others, but not to an infant under the age of discretion. (1 *Hale's R.* 706.) That is, this is the rule, unless the statute contains an exception in favor of infants. Said Chief Justice Nelson, in giving the opinion of the court in a case decided by the supreme court of the State of New York: "All the books agree that when an act is denounced as a crime, even of felony or treason, by a general statute, it extends as well to infants, if above years, as to others." (*The People v. Kendall*, 25 *Wend. R.* 399, 401.) It has, however, been held that general statutes that give corporal punishment are not to extend to infants; and therefore, if an infant be convicted of a ravishment of ward, he will not be imprisoned, though the statute of England upon the subject be general. (*Stowell v. Zouch*, *Plowdon's R.* 364.) But this must be understood when the corporal punishment is, as it were, collateral to the offense, and not the direct intention of the proceeding against the infant for his misdemeanor; in many cases of which kind, the infant under the age of twenty-one will be spared, though possibly the punishment be enacted by parliament. (10 *Petersdorff's Abridgment*, 402, *note.*) In other words, if the statute punishes corporally an act that was not an offense at common law, or that was an offense, but not

before punished corporally, and does not constitute it an offense by name, which, by the common law, is punished corporally, an infant, if infants are not named in the statute, will not be punished corporally. Tenderness to infants led to this construction of the statutes, that minors should not be ousted of their common law privilege, unless the legislature had expressly declared that they should be. (*Reeve's Dom. Rel.* 258.)

As a general rule, an infant at any age is not liable for a misdemeanor which consists in not doing what the law commands to be done, that is to say, for an offense which is a mere non-feasance. (*Foster*, 70.) But when the offense is a notorious breach of the peace, such as a riot, or battery, an infant above the age of fourteen is as liable to suffer fine and punishment for such a misdemeanor, as a person of full age. (*McPherson on Inf.* 451.) And in the State of Tennessee in such a case, the property of the infant will be liable for the fine and costs. (*Beardsley v. The State*, 2 *Yerg. R.* 481.)

In Alabama it was held, that an infant between the ages of seven and fourteen is *prima facie* incapable of committing a crime; but if, after allowing due consideration to his age, and to the additional fact that he is a slave, the evidence convinces the jury beyond a reasonable doubt, that he fully knew the nature and consequences of his act, and plainly showed intelligent design and malice in its execution, he may be convicted of murder. (*Godfrey v. The State*, 31 *Ala. R.* 323.)

A minor may be indicted and punished for obtaining goods by false pretenses against the provisions of the statute of New York, in such a case; the statute containing no exception in favor of infants. (*The People v. Kendall*, 25 *Wend. R.* 399.) And in England an infant is liable to an indictment for neglecting to repair a bridge, which he is otherwise bound to repair, provided there is no other person against whom performance of repairs can be enforced. It is otherwise, however, when the land of the infant charged with the repair of the bridge is occupied by his guardian. (*Rex v. Sutton*, 30 *Eng. C. L. R.* 279.)

In England it has been held in general terms that an infant, after he has arrived to the years of discretion, is liable criminally, for permissive waste, for escapes, for perjury, for not coming to church, for cheating with false dice, for batteries and for slanders. (*Anonymous*, 3 *Salk. R.* 196.)

§ 131. On the trial or examination of an infant for a crime, he may appear and defend himself in person, or by attorney; and it has been held in Virginia, to be error for the court to assign the infant a guardian, and try the case on a plea pleaded for him by the guardian. (*Word v. The Commonwealth*, 3 *Leigh's R.* 743.) In cases of simple misdemeanor, the infant may not, as a general thing, appear and plead to the indictment personally, though in cases of felony he must.

In case infancy is set up as a defense to a criminal prosecution, the infancy must be proved by competent evidence. The mere opinion of a witness respecting the age of a person, judging from his appearance, unaccompanied by the fact on which the opinion is founded, is inadmissible evidence. (*Morse v. The State*, 6 *Conn. R.* 9.)

As a general thing, the rule with respect to the indictment, arraigning and trial of infants on charges of crime, is the same as in case of adults.

CHAPTER XII.

ACTION IN FAVOR OF INFANTS—HOW INFANTS MUST SUE—ACTIONS AGAINST INFANTS—HOW INFANTS MUST DEFEND—THE PRIVILEGES OF INFANTS IN THE COURTS—THE GENERAL PROTECTION AFFORDED INFANTS BY COURTS OF EQUITY—COSTS AGAINST INFANTS.

§ 132. It may be laid down as a general rule, that, in all cases personal in their nature, such as assaults, batteries, libels, verbal slander, and other injuries to the person, infants have their action the same as adults, and the same principle with respect to damages and the like applies to them as to adults. So when an infant has been emancipated by his parents he is entitled to his action for personal services in the same manner as though he was of full age. And whenever a party enters into a contract with a minor personally, or purchases property of him, or deals with him on his own account, such party must respond to him in an action the same as though he was an adult. So in all cases when an infant has the possession and control of his property, he may bring his action for its conversion, or any damage or injury to it, the same as though he was of full age. In a word, when the infant has a just cause

of action he may bring his suit for it, and the personal disability of infancy will in no case deprive him of his right. The only difference between infants and adults with respect to their actions, is in the form of proceeding. The result of the action is the same in both cases. It is said that an infant cannot sue as an informer on a penal statute, because an informer must exhibit his suit in person, and prosecute it either in person or by attorney. (*McPherson on Inf.* 356.)

An infant *cestui que trust* has not generally an action at law, for when there are two kinds of estates in different persons, the one equitable and the other legal, the person having the equitable estate must call in aid the legal estate before he can recover in a court of law. (*Vide Shewen v. Wroot*, 5 *East. R.* 132, 137.) But the rule is the same when the *cestui que trust* is an adult; so that this forms no exception against an infant.

An action by an infant must be prosecuted by guardian or *prochein ami*, but always in the name of the infant; and the suit is the infants to all intents, the same as though he was of full age; and in an action brought by an infant, as a general rule, the same defense may be interposed as in case of an adult plaintiff. For instance, it is a well settled rule, by repeated authorities, that in actions for *negligence* the person bringing the action must be *free from negligence contributing to the injury*; and this rule is as applicable to a *child six or seven years of age*, who may bring the action, as to an adult plaintiff. If the infant in fact becomes guilty of negligence and in consequence thereof suffers personal injury, he is not to take advantage of his own wrong and thereby entitle himself to an action of redress. (*Honegsberger v. The Second Avenue Railroad Company*, 33 *How. Pr. R.* 193. *Hartfield v. Roper*, 21 *Wend. R.* 615.) Although the action is prosecuted by a *prochein ami* or guardian, the *prochein ami* or guardian cannot be considered a party to the suit. (*Sinclair v. Sinclair*, 13 *Mees. & Wels. R.* 640, 646. *Brown v. Hull*, 16 *Vt. R.*, 673.) He is rather an officer of the court, appointed to look after the interests of the infant and manage the suit for him. (*Ib*, and *Duckitt v. Stackwell*, 12 *Mees. & Wels. R.* 779.)

§ 133. When an infant becomes plaintiff in an action the process is sued out in the name of the infant, although, as has been intimated, the infant cannot prosecute the action in person. As he has no power to appoint an attorney, the infant must in all cases

prosecute his action by guardian or *prochein ami*. If he have a guardian he may sue by *prochein ami*, unless the guardian dissent. (*Thomas v. Dyke*, 11 *Vt. R.* 273. *Hardy v. Scanlin*, 1 *Miles' [Penn.] R.* 87.) So he may prosecute his action by *prochein ami*, although he has a mother living; or, at least that fact would be no cause of abatement. (*Trask v. Stone*, 7 *Mass. R.* 241.)

In Indiana the writs may be in the ordinary form, but the declaration must be by guardian or *prochein ami*. (*Bouche v. Ryan*, 3 *Blackford's R.* 472.) In the State of New York, when an infant is a party, whether plaintiff or defendant, he must appear by guardian (*Code of Procedure*, § 115), and when he is plaintiff he must have a guardian appointed before the action is commenced or the summons issued. (*Hill v. Thacter*, 3 *How. Pr.* 407.)

Under the present practice in New York it is irregular to commence an action in favor of an infant by *prochein ami* or next friend, as formerly, but it must be by guardian. (*Hoftailing v. Teal*, 11 *How. Pr. R.* 188.) And the complaint must show by proper averments that such guardian was duly appointed, or the pleading will be defective, and may be demurred to and the proceedings quashed. (*Hulbut v. Young*, 13 *How. Pr. R.* 413.)

An infant at common law could sue either by guardian or *prochein ami*. The old cases say that when he sues or defends by guardian, the guardian must have a warrant; but if he sues by *prochein ami*, the *prochein ami* need not; but it must appear that both the guardian and *prochein ami* have been admitted by the court. (*Fitzgerald v. Villiers*, 3 *Mod. R.* 236. *Young v. Young*, *Cro. Cases* 86.) And it was held that it should be alleged to have been so in the declaration. (*Camlens v. Walters*, 1 *Liv. R.* 224. *Swift v. Nott*, 1 *Sid. R.* 173.)

By the modern practice, there should be a regular admission of the *prochein ami* by the court, but the recital of admission in the declaration is a sufficient record and proof of the admission. (*Miles v. Boyden*, 3 *Pick. R.* 213. *Judson v. Blanchard*, 3 *Conn. R.* 579. *Turner v. Partridge*, 3 *Penn. R.* 172. *Heft v. McGill*, 3 *Barr's [Penn.] R.* 256.) In Indiana, without such an admission or entry as would make the *prochein ami* liable for costs, the defendant is not bound to plead, but may have the suit dismissed. (*Keeran v. Clowder*, 5 *Blackford's R.* 604.) The fact of infancy must be distinctly stated, as well as the admission of the *prochein ami*. (*Shirley v. Hagar*, 3 *Blackford's R.* 225. *McGillcuddy v. For-*

syth, 5 *ib.* 435. *Hawley v. Levinz*, 5 *Ohio R.* 227.) However, verdict will cure the omission to state such fact of infancy, or such admission by the court. (*Kid v. Mitchell*, 1 *Nott & McCord's [S. C.] R.* 334. *Hamilton v. Foster*, 1 *Brevard's [S. C.] R.* 464.) A verdict would even cure an appearance by the infant plaintiff by attorney. (*Apthorp v. Backus*, *Kirby's [Conn.] R.* 407.)

In Alabama, a suit may be brought by *prochein ami* without first obtaining leave of the court. (*Bethra v. McCall*, 3 *Ala. R.* 449. *Isaacs v. Boyd*, 5 *Porter's R.* 388.)

If an infant should bring his action, without guardian or *prochein ami*, it is no ground of nonsuit, but advantage can be taken of the irregularity only by plea in abatement. (*Schermerhorn v. Jenkins*, 7 *Johns. [N. Y.] R.* 373. *Smith v. Van Houten*, 4 *Halst. [N. J.] R.* 381. *Fellows v. Nivers*, 18 *Wend. R.* 563. *Heft v. McGill*, *Barr's R.* 256. *Drago v. Moses*, 1 *Spear's [S. C.] R.* 212. *Blood v. Harrington*, 8 *Pick. [Mass.] R.* 552.) But in one case in South Carolina, it was held that a minor can commence an action, but he will be nonsuited at the trial, unless some one be appointed his *prochein ami*, or guardian. (*McDaniel v. Nicholson*, 2 *Rep. Const. Court*, 344.)

In New York, when an infant commences his action by attorney, and the defendant does not know the infancy to be material, it has been held an excuse for delay, in moving to set the proceedings aside. (*Ex parte Scott*, 1 *Cow. R.* 33.) If the first process be issued before the appointment of a guardian or *prochein ami*, the proceedings will not be set aside, if the appointment had been made previous to the motion to set aside, and the costs of the motion paid. (*Fitch v. Fitch*, 18 *Wend. R.* 513. *Vide also Fulbright v. Carmefield*, 30 *Miss. R.* 425. *Stumps v. Kilby*, 22 *Ill. R.* 140.) And on plea in abatement in Massachusetts, the next friend may be inserted by way of amendment. (*Blood v. Harrington*, *supra*.)

§ 134. If an infant and a man of full age are made executors, they may bring an action as executors, and the infant may sue by attorney, without making any *prochein ami* or guardian, because the executors sue in the right of the testator, and not in their own right; and therefore he that is of full age may appoint an attorney for him that is within age, for the reason that an infant executor cannot be summoned and sworn. (*Smith v. Smith*, *Yelverton's R.* 130. *Anonymous*, 1 *Roll. Abr.* 288. *Foxwist v. Tremaine*, 2 *Saund. R.*

212. *Foxwist v. Tremaine*, 1 *Sid. R.* 499.) And it seems that the infant executor must be joined as plaintiff with the adult executor, even though he have not proved the will. (*Cabell v. Vaughan*, 1 *Wms. Saund. R.* 291 *h.*) However, an infant executor who has not proved the will need not join an executor of full age, in a *scire facias*, on a judgment for the testator, the facts being stated in the *scire facias*. (*Hutton v. Mascall*, 1 *Liv. R.* 181. *Hutton v. Mascall*, *Raym. R.* 198. It has been held in one case not to be error, though an infant *sole* executor sue by attorney, upon the principle above stated. (*Beale v. Starkey*, *Cro. Eliz.* 542.) The better opinion, however, is that in case of a *sole* executor his action should be prosecuted by his guardian or *prochein ami*. (*Reeve's Dom. Rel.* 267. *Cotton v. Westcott*, *Cro. Jac.* 441. *Foxwist v. Tremaine*, 1 *Ventris' R.* 103.)

The rule that an infant must appear by *prochein ami*, or next friend, and not by attorney, relates to the appearance upon the record; but in notices and rules the attorney of the *prochein ami* may use his own name. (*People v. New York Common Pleas*, 11 *Wend. R.* 164.)

The offices of guardian and *prochein ami* are entirely distinct, and the privilege of suing by *prochein ami* did not exist in England until it was allowed by statute, and by the statute the privilege was given only in cases of necessity, as when an infant was to sue his guardian or was eloiigned, as when the guardian would not sue for him. In all except these exceptional cases the suit was required to be by guardian and not by *prochein ami*. (*Bac. Abr. tit. Infancy, K.*) Judge Reeves said: "It is contended by some that he may sue by *prochein ami* in all cases, but the authorities teach a different doctrine. If it was allowable for an infant to sue by his *prochein ami* in all cases, he might squander his property in needless suits, in spite of his guardian; and indeed it would be wholly destructive of that necessary control of the guardian over the infant, with which the law has invested him." (*Reeve's Dom. Rel.* 264.)

§ 135. The guardian or *prochein ami* of an infant plaintiff must be appointed by the court, except in some instances, by the statutes of a particular state, he may be appointed by a judge of the court or by some other officer authorized to discharge the duties of such judge at chancery, and no legal right of parentage or guardianship will enable any one to act for the infant without such appointment.

The old practice as to the appointment of *prochein ami* or guardian was for the person intended as *prochein ami* or guardian, to attend with the infant before a judge at chambers, who granted his fiat for one of the masters to draw up the rule, or in a court of law the judge would at once grant the admission. The admission was left with the clerk or register of the court, and the rule was entered in the office of the clerk or register. A copy of the rule or admission was annexed to the declaration before it was served. (*Archbold's Practice*, 889, 7th ed. by Chitty.) If the *prochein ami* or guardian and the infant could not attend, a petition was written and signed by the infant, praying to be admitted to prosecute his action by the person proposed as his *prochein ami* or guardian, stating the cause of action in the petition. At the foot of the petition the proposed *prochein ami* signed his consent to act for the infant. To this was annexed an affidavit of the signing of the petition and consent; and then all was presented to the judge or other officer, who granted his fiat or admission, and the same was filed and entered as above. (*Archbold's Practice*, 889, 7th ed. by Chitty.) This is substantially the practice at the present day, except it is varied by the statute or rule of court. In the State of New York, the infant must now appear by guardian, who may be appointed by the court in which the action is prosecuted, or by the judge thereof, or a county judge. The application for an infant plaintiff is made by himself if he is of the age of fourteen years; or, if under that age, by his general or testamentary guardian, if he has any, or by a relative or friend of the infant. If made by a relative or friend of the infant, notice of the application must first be given to such guardian, if he has one; if he has none, then to the person with whom such infant resides. (*Code of Procedure*, §§ 115, 116.) The application is made by petition and presented to the judge, who signs an order appointing the guardian, when the petition and order are filed with the clerk of the court in which the action is commenced. In a partition suit, however, the practice is regulated by the revised statutes and other special acts, and the guardian must be appointed in all cases by the court, whether for an infant plaintiff or defendant. (2 *R. S.* part 3, ch. 5, tit. 3, § 2. 2 *Stat. at Large*, 396. *Laws of 1852*, ch. 277. 4 *Stat. at Large*, 615.)

An infant who is unable to write or make petition will be permitted to prosecute an action by guardian or next friend. (*Eades v. Booth*, 55 *Eng. C. L. R.* 718.)

The power to appoint a guardian for an infant plaintiff is incident to a justice's court, as well as to every other court, and the appointment is made by application to the justice in the same form as to another court. (*Mackey v. Grey*, 2 Johns. R. 192.)

§ 136. In England, the court will appoint a *prochein ami* as its officer to conduct a suit for an infant, and to look after his interests, and no appointment or subsequent confirmation by the infant party is requisite, whether he be an infant of the tenderest age or of years of discretion; nor does it signify at all whether he is cognizant of the proceeding or not, or whether he is in the country or abroad; and the infant cannot disavow the action. (*Morgan v. Thorne*, 7 Mees. & Wels. R. 400.) Parke, B., says: "The law knows of no distinction between infants of tender age and of mature years; and as no special authority to sue is requisite in the case of an infant just born, so none is requisite from an infant on the very eve of attaining his majority. It appears perfectly clear that every *prochein ami* is to be considered an officer of the court, specially appointed by them to look after the interests of the infant, on whom the judgment in the action is consequently binding, and who cannot be allowed, on attaining his age, to commence fresh proceedings founded on the same cause of action; so that the defendant in this and all similar cases is perfectly safe in paying the damages recovered." (*Morgan v. Thorne*, 7 Mees. & Wels. R. 646.) The same rule formerly prevailed in the court of chancery of the State of New York. In one case, the chancellor remarked: "It is not necessary for the person prosecuting a suit in the name of infants to show that the same was commenced with their knowledge or consent. Any person may bring a suit in their name as their next friend, because he does it at his peril. (*Andrews v. Cradock*, *Precedents in Chancery* 376.) The only check upon this general license is, that on a proper application the court will refer it to a master to inquire whether such suit is for the benefit of the infants; and if the master reports that it is not for their benefit, or that it is not for their interest that it should be prosecuted by the particular person who has instituted the suit, the court will order the proceedings to be stayed." (*Fulton v. Rosevelt*, 1 Paige's R. 178, 179.) The *prochein ami*, however, had to be appointed by the court, and an insolvent person was not permitted to prosecute in the name of infants without giving security for costs. (*Fulton v. Rosevelt*, *supra*.)

In England, Lord Chancellor Brougham expressed his opinion upon the subject of suits being instituted by next friends thus: "The true and just principle which should govern all such cases is this, no discouragement ought to be thrown in the way of persons *bona fide* suing as next friends; but no undue facility should be given to mere volunteers, who interfere rather for their own purposes than for the infant's advantage. While they appear to act *bona fide* they will be protected; the presumption will rather be in their favor; the proof will rather be thrown upon those who impeach their motives; the leaning will be more for than against them; no forced constructions will be put on their conduct; no benefit from bare possibilities will be conjured up in their behalf. They must be content to have their motives appreciated and their acts judged like other parties. If they have involved themselves in suspicion, their proceedings must be subjected to inquiry; if they have incurred just blame, be it by improper interference, or be it by unnecessary interference, they must abide the consequences; the suit at their instance must be stayed; or, if the suit be useful to the infant, but the parties instituting it be unfit to conduct it, they must give place to others in whom the court can better repose confidence. It follows that every such case must depend upon its circumstances; nor will the court even order an inquiry unless just cause of suspicion exists." (*Nalder v. Hawkins*, 2 *Mylne & Keen's R.* 243.) A similar practice is now followed in many of the states; but in the State of New York this practice no longer exists. (*Vide ante*, § 135.)

In the State of Texas, an infant may sue by a next friend, though he have a general guardian, unless the guardian expressly dissent. (*Robson v. Osborn*, 13 *Tex. R.* 298.) The guardian must be a responsible person, who is competent to answer for the costs in the action. (*Cook v. Rawdon*, 6 *How. Pr. R.* 233. *Dalrymple v. Lamb*, 3 *Wend. R.* 424.) Though in the State of South Carolina, an insolvent person may be appointed *prochein ami* to prosecute the action for an infant on giving security for the payment of costs. (*Smith v. Anderson*, 1 *Bailey's R.* 203.) And generally, an infant who has no means of indemnifying a responsible person for costs will be permitted to sue by his next friend *in forma pauperis*. In such case, however, the court will, in the first place, see that there is probable cause for the proceeding, and will appoint a proper person as a *prochein ami*. (*Fulton v. Rosevelt*, 1 *Paige's R.* 178.)

§ 137. As has been suggested, it is a general rule that in all cases when an infant has a just cause of action he may bring his suit for it. Thus, he may bring an action upon any contract entered into with him personally. (*McGiffin v. Storrs, Cow's* [N. J.] R. 72.) So an infant can bring an action for the conversion of his personal property, though he have a father or guardian. (*Stafford v. Roof*, 9 Cow. R. 626.) So also an infant has an action on a promise of marriage, and in such action he need not aver or prove the consent of the parent or guardian. (*Cannon v. Alsbury*, 1 A. K. Marsh. [Ky.] R. 76.) An infant performing a contract within the statute of frauds may recover upon the common counts for money paid or services performed under it, though he cannot recover upon the contract any more than an adult. (*King v. Brown*, 2 Hill's [N. Y.] R. 485.)

An infant can maintain an action for use and occupation of his land, although he has a general guardian. (*Porter v. Bleiler*, 17 Barb. [N. Y.] R. 149.) And if the infant has received his rents he cannot demand them again after he becomes of age. (*Parker v. Elder*, 11 Humph. R. 546.) An infant can maintain an action of ejectment to recover the possession of his lands from a wrong-doer. (*Porter v. Bleiler*, 17 Barb. 149, 153, *per Marvin, J.* Vide also *McPherson on Inf.* 354, and cases there cited. *Doe v. Thomas*, 16 Mees. & Wels. R. 778.) An infant may also maintain an action in equity to recover personal property from the hands of executors or trustees when he is entitled to the possession of such property. The general guardian of such infant cannot file a bill in his own name to obtain possession of the property of his ward. (*Bradley v. Amidon*, 10 Paige's R. 235.)

An infant husband may bring an action and recover damages for debauching his wife. (*Morgan v. Thorne*, 7 Mees. & Wels. R. 400.)

Sometimes the property of an infant may be so situated that an action cannot be sustained in his name with respect to all matters relating to it. For example, infant heirs to whom a farm had descended, but which was in the actual possession of the mother and step-father of such infants, cannot maintain an action for the use and occupation of such farm, or bring trover for the value of crops taken from the farm. The reason is that the mother and step-father of the infant in such a case are presumed to be in law fully in the possession and occupation of the farm, the mother as *guardian in socage*, and the step-father *jure uxoris*; and therefore the products of the farm would not belong to the infants, but rather

to their step-father. (*Bucher v. Crouse*, 19 *Wend. R.* 306, 308.) So when the guardian of a minor makes a lease of the land of his ward, reserving rent, the action for the non-payment of the rent cannot properly be brought in the name of the infant, but should be brought in the name of the guardian as plaintiff. (*Pond v. Curtiss*, 7 *Wend. R.* 45.)

An action may be brought for an injury to a child of the most tender age in the name of the child; but in such an action, if there be negligence on the part of the plaintiff, there can be no recovery. Although the child, by reason of his tender age, be incapable of using that ordinary care which is required by a discreet and prudent person, the want of such care on the part of the parents or guardians of the child furnishes the same answer to an action by the child as would its omission on the part of the plaintiff in an action by an adult. (*Hartfield v. Roper*, 21 *Wend. R.* 615.) This is upon the well settled principle that if the party injured has drawn the mischief upon himself by his own neglect, he is not entitled to an action; but in case of an infant or an adult, though there may have been negligence on the part of the plaintiff, if the injury was voluntary or arose from *culpable negligence* on the part of the defendant, an action can be maintained. (*Id.*) An action may, in some cases, also be brought by the father for personal injuries to his infant child. But the gist of the action in such a case is the loss of service; and if a child be of such tender years as not to be capable of performing service, the father has no action, unless it might be a special action for expenses necessarily incurred by reason of the injury. (*Hall v. Hollander*, 10 *Eng. C. L. R.* 436. *Vide also Flemington v. Smithers*, 12 *ib.* 131.) By the present statutes of New York every action must be prosecuted in the name of the real party in interest, except in the cases of an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, a suit may be brought without joining the person for whose benefit the action is prosecuted; and it is declared that a trustee of an express trust, within the meaning of this provision, shall be construed to include a person with whom; or in whose name, a contract is made for the benefit of another. (*Code of Procedure*, §§ 111, 113.) This, of course, would extend to a case like that of *Pond v. Curtiss*, *supra*, but does not interfere in the least with the general principles suggested with respect to actions in favor of infants.

§ 138. The court takes great care of the interests of an infant plaintiff, and will stop any suit that is not for his benefit, and will remove a next friend or guardian who is not likely to conduct the suit properly. (*Sale v. Sale*, 1 *Brev. R.* 586. *Guy v. Guy*, 2 *ib.* 460. *And vide Walker v. Else*, 7 *Sim. R.* 234. *Arnott v. Blaesdale*, 4 *ib.* 387. *Garr v. Drake*, 2 *Johns. Ch. R.* 542. *Fulton v. Roosevelt*, 1 *Paige's R.* 478. *Watson v. Fraser*, 8 *Mees. & Wels. R.* 660.) An unwillingness to prosecute the suit is sufficient cause for a change of guardian. (*Hardin v. Scanlin*, 1 *Miles' [Penn.] R.* 87. *Ward v. Ward*, 3 *Meriv. R.* 706.)

If two suits for the same purpose are instituted in the name of an infant, by different persons acting as his next friend, the court will, on motion, as a matter of course, direct an inquiry to be made, to ascertain which suit is most for his benefit, and which is most proper to be proceeded with. This inquiry is made on reference to a master, and the master is at liberty to state special circumstances. Upon the reference it is competent for the master to point out any improvements that may be made in the form of the suit, or any other circumstances that may be for the benefit of the infant. All proceedings in both suits, except such as may be required in pursuance of the reference, are stayed until the master shall have made his report. (*Donner v. Fortescue*, 3 *Atk. R.* 130. *McPherson on Inf.* 371, and cases cited.) And when but one suit is commenced by a next friend for an infant, the court, on suggestion, will refer it to a master to report whether the suit is for the infant's benefit. (*Garr v. Drake*, *supra.*) This shows how exceedingly cautious the courts are in guarding the interests of infants, when any matter which may affect their interests is before them. Should there be a change of *prochein ami*, or guardian, pending the action, the fact must be entered on the record. (*Davies v. Lockett*, 4 *Taunton's R.* 765.) And when the change is made, the former guardian is a competent witness in the case. (*Burks v. Shain*, 2 *Bibb's [Ky.] R.* 341.)

§ 139. So also the courts always show an infant especial favor in all litigations in their behalf. Thus, where a bill was brought on behalf of an infant, to have the possession of a family estate as tenant in tail under an old settlement, and for general relief, on an issue, the father of the plaintiff was found to have been illegitimate, and the plaintiff, waiving his claim to the whole estate, insisted on having the benefit of a certain agreement between his

father and his grandfather, under which he would be entitled to *part* only of the estate; Lord Hardwicke held that the agreement was binding, and decreed for the plaintiff on this point, deciding that in the case of an infant, he would allow him to have a decree "upon any matter *arising upon the state of his case*, though he has not particularly mentioned and insisted upon it and prayed it by his bill." (*Stapilton v. Stapilton*, 1 *Atk. R.* 2, 5.) So also where a bill by an infant insisted on a certain construction of a settlement, and that, if such were not the legal construction, yet such was the intention of the settlor (without referring to any articles of instructions); and upon the hearing it was proposed to read on the part of the plaintiff, instructions which had been sent by the settlor; Lord Hardwicke said that if the bill had been brought to make the settlement agreeable to articles or instructions, and had pointed out those instructions particularly, they might have been read in evidence; that the proper method was to point out the articles or instructions, though it was not to be laid down as a general rule, that no case can be so circumstanced as to make it unnecessary to point out the articles, or when the settlement itself refers to them. But this being the case of an infant, his lordship gave an opportunity to amend his bill, that he might have the benefit of those instructions. (*Prichard v. Quinchant*, *Ambl. R.* 147.) And in all cases a court of equity will protect the rights of infants when they are manifestly entitled to something, although their guardian *ad litem* neglects to claim it in their behalf. (*Stephens v. Van Buren*, 1 *Paige's R.* 479.)

And again, the court will not allow any advantage to be taken of the mistakes of those who act for infants. (*Serle v. St. Eloy*, 2 *P. Wms. R.* 386.) So the court will also elect for an infant, when it is necessary to decide between two modes of proceeding. Thus, if an ejectment bill is brought on behalf of an infant for possession, and an account of rents and profits, the court may elect for him to proceed at law, and retain the bill for mesne profits; whereas an adult will be obliged to make his election to proceed in equity or at law, and if at law he must proceed for the whole in a court of law. (*Vide Dormer v. Fortescue*, 3 *Atk. R.* 129. *Stevens v. Stevens*, 6 *Madd. R.* 97.) It seems also, that where an infant plaintiff neglects to reply, it is not, as in the case of an adult, an admission of the facts in the answer, and, therefore, he is not affected by his neglect to reply, but all of the facts must be proved.

(*Logan v. Sheffield*, 2 *Atk. R.* 377.) The authorities cited will suffice to show the general principle upon which the courts are disposed to favor an infant plaintiff in the cause of his suit; but an infant plaintiff is as much bound by a decree, and by all the proceedings in a cause, as a person of full age; and cannot, nor can his representatives, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud and collusion, which will annul the proceedings of courts of justice, as much as any other transactions. (*Gregory v. Molesworth*, 3 *Atk. R.* 626. *Lord Brook v. Lord Hertford*, 2 *P. Wms. R.* 519. And *vide Field v. Williamson*, 4 *Saund. Ch. R.* 613.) And the knowledge of the next friend, when there is no collusion, is the knowledge of the infant; and, generally speaking, the infant is bound by the conduct of his solicitor in the progress of the cause. (*Kemp v. Squire*, 1 *Dick. R.* 131.)

§ 140. Reference has already been made generally to those cases in which an infant is liable to an action (*ante*, *ch.* 11); and it is, therefore, only necessary here to refer to the manner of proceeding in suits in which an infant is defendant. An action may be commenced against an infant, as it may against a person of full age, and it is no excuse, when there has been unusual delay in prosecuting a demand, to say that there has been infancy on the part of those against whom the demand is made. (*Jones v. Tuberville*, 2 *Ves. Jr.* 11.)

When the suit is instituted against an infant, his infancy is not noticed in the first process, or in the bill of complaint if accompanying the process, unless it be a material fact in the cause; and the first papers are served in the usual way, the same as though he was of full age. But the infant can only defend by guardian, and if he appear by attorney, or in person, it is error. The authorities on this point are numerous and decisive, and are general in their application. (*Vide Comstock v. Carr*, 6 *Wendell's R.* 526. *Alderman v. Tirrell*, 8 *Johnson's R.* 418. 14 *ib.* 417. *Bus-tard v. Yates*, 4 *Dana's [Ky.] R.* 429. 6 *ib.* 108. *Bedell v. Lewis*, 4 *J. J. Marshall's [Ky.] R.* 562. *Jeffrie v. Robideaux*, 3 *Missouri R.* 33. *Nicholson v. Wilbur*, 13 *Georgia R.* 467. *New York Code of Procedure*, § 115.) But in North Carolina, the court held that a judgment of *nil dicit* against an infant, is not void, but only erroneous (*White v. Allenson*, 3 *Devereux's R.* 241.)

This person who appears and defends for the infant defendant, is called the guardian *ad litem*. His duties are limited to the particular suit, and he has none of the powers or liabilities of a permanent guardian. He must be appointed by the court, or by such other functionaries as the statute of the particular state may prescribe, and he may generally be appointed on the motion either of the plaintiff or defendant.

In the State of New York, the guardian *ad litem*, is appointed upon the application of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then, upon the application of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one within the state; if he has none, then to the infant himself, if over fourteen years of age, or, if under that age, and within the state, to the person with whom such infant resides. (*Code of Procedure*, § 116, *subd.* 2.) The application for the appointment of the guardian *ad litem* to defend for the infant, is made to the same officer, and in a similar mode, as in case of the appointment of a guardian for an infant plaintiff. When the infant defendant is a married woman, her husband is usually appointed her guardian to defend the action for her, unless he has an interest adverse to her, or is incompetent in some other respect.

The admission of a guardian to defend one suit, will not authorize the same guardian to defend another action against the infant defendant, except by another appointment. There must be a separate appointment for each case. (*Rule of Court*, 3 *Barn. & Ad. R.* 374.) In Pennsylvania, however, the infant may defend by his general guardian, who has been regularly appointed by the orphan's court. (*Mercer v. Watson*, 1 *Watts' R.* 330.) And a co-defendant may be appointed the *guardian ad litem* to other defendants who are infants. (*Prascod v. Tully*, 5 *Eng. Law & Eq. R.* 127.)

In the State of Virginia, the court may appoint a guardian *ad litem* for an infant defendant, and the person appointed is obliged by statute to act in the suit and take charge of the defense. (*Code of 1849*, *ch.* 171, § 16.)

If no appearance by guardian *ad litem* be entered for the infant defendant within the time prescribed by statute or rule of court,

the plaintiff may have a rule to assign a guardian for the infant. (*Judson v. Storer*, 2 *South. [N. J.] R.* 544. *Cole v. Pennell*, 2 *Rand. [Va.] R.* 174. *Mackey v. Grey*, 2 *Johns. R.* 192. *Fearing v. Clauson*, 1 *Hall's R.* 55. *Mercer v. Watson*, 1 *Watts' R.* 330. *Clark v. Gilmanton*, 12 *N. H. R.* 515.)

If an infant appear in person, or by attorney, it is error in fact, and may be assigned in the court by which the judgment is pronounced. (*Castledine v. Mundy*, 1 *Nev. & Man. R.* 635. 4 *Barn. & Ad. R.* 90. *Meredith v. Sanders*, 2 *Bibb's [Ky.] R.* 101.) The infant defendant cannot appear in person or by attorney even to move to set aside former proceedings, on the ground of want of appointment of a guardian *ad litem*. (*Shepherd v. Hibbard*, 19 *Wend. R.* 96.)

An infant defendant sued as administratrix cannot appear by attorney. (*Hindmarsh v. Chandler*, 2 *Eng. C. L. R.* 183.) The appearance by attorney is not ground of error if the plaintiff become nonsuit. (*Bird v. Pegg*, 7 *Eng. C. L. R.* 153.) But it has been held in such a case before judgment that the court will order such appearance struck out, and the infant to pay the costs. (*Paget v. Thompson*, 13 *Eng. C. L. R.* 69.)

It has been held that a judgment against an infant defendant without the regular appointment of a guardian *ad litem* is simply erroneous, and that if an actual defense were interposed by one acting as guardian *ad litem*, it may be sufficient without any express appointment. (*Vide Brown v. McRae's Executors*, 4 *Munf. [Va.] R.* 439. *Priest v. Hamilton*, 2 *Tyler's [Vt.] R.* 44. *Mercer v. Watson*, *supra*. *Cato v. Easley*, 2 *Stew. [Ala.] R.* 214.) But if there is an express appointment of a guardian *ad litem*, it seems to be necessary that such guardian appear or otherwise accept. (*Shaefer v. Gates*, 2 *B. Mon. [Ky.] R.* 453. *Fox v. Casley*, 2 *Call. [Va.] R.* 1. *Carneal v. Sthreshley*, 1 *A. K. Marsh. [Ky.] R.* 471. *Daniel v. Hannigan*, 5 *J. J. Marsh. [Ky.] R.* 48. *St. Clair v. Smith*, 3 *Ohio R.* 355. *Young v. Whitaker* 1 *A. K. Marsh. [Ky.] R.* 398.)

As was suggested with respect to an infant plaintiff, the rule as to appearing by attorney relates only to the appearance *on the record*, and does not deprive the infant of the professional aid of an attorney, in whose name rules may be entered and notices served. (*People v. New York Common Pleas*, 11 *Wendell's R.* 164.)

It has been held by the supreme court of the United States, that the duty of watching over the interests of infant defendants, devolves in a considerable degree on the courts; and that it is a mark of inexcusable inattention to appoint a guardian *ad litem* on the motion of the opposite counsel, without bringing the minors into court, or issuing a commission for the purpose of making inquiry as to the appointment. (*Bank of the United States v. Ritchie*, 8 *Peter's R.* 128.)

In a foreclosure suit in the English court of chancery, when a decree was taken against a defendant subsequently discovered to be an infant, the court declined to rehear the case, or in any way expedite the foreclosure of the equity of redemption; but held that a supplemental suit must be filed, or a new suit instituted. (*Darwin v. Nicholson*, 19 *Eng. L. & Eq. R.* 436.)

It may be repeated in this place that a judgment or decree rendered without any guardian, or on an appearance by attorney, is not *void*, but merely voidable on error brought, or other proceedings to set it aside. (*Bloom v. Burdick*, 1 *Hill's [N. Y.] R.* 130. *Barber v. Graves*, 18 *Vt. R.* 290. *Porter v. Robinson*, 3 *A. K. Marsh. [Ky.] R.* 253. *White v. Albertson*, 3 *Dev. [N. C.] R.* 241.)

§ 141. An appointment of a guardian *ad litem* for infant non-resident heirs, without order of publication or other service of process on them, does not make them parties to a suit; nor will they be bound by the decree in such a case. The action must be commenced against the infant defendants in some of the ways prescribed by the statute or the practice of the court for the commencement of suits. (*Collard's Heirs v. Groom*, 2 *J. J. Marsh. [Ky.] R.* 487. *Shropshire v. Reno*, 5 *Dana's [Ky.] R.* 584. *Jones, Exr. v. McGinty*, 3 *ib.* 425.

When there is an infant defendant in a court of equity the cause should not be heard without an answer for him. If the guardian *ad litem* fail to answer, the court should coerce the answer, or appoint a new guardian *ad litem*, and defer the hearing until the answer comes in. (*Henly v. Gore*, 4 *Dana's [Ky.] R.* 136.)

As a general thing, a judgment against several, which is erroneous because one of the defendants, who is an infant, did not appear by guardian *ad litem*, will be set aside as to all; for the reason that a judgment is an entirety. Even though the action be one in which the parties defendants might be several, the appearance of an infant by attorney, and judgment against him and

others, is ground of reversal as to all. (*Cruikshank v. Gardner*, 2 *Hill's* [N. Y.] R. 333. *Sargeant v. French*, 10 N. H. R. 444.) If the infant co-defendant plead his infancy, the plaintiff may have leave to enter a *nolle prosequi* as to him, and take judgment against an adult; or on the trial the jury may find a verdict for the infant and against the adult, for the infancy of one will in no way avail the adult defendant. (*Hastings v. Thompson*, 5 *Johns.* [N. Y.] R. 160. *Van Bramer v. Cooper*, 2 *ib.* 279. *Woodward v. Newhall*, 1 *Pick.* [Mass.] R. 500. *Cutts v. Gordon*, 13 *Maine R.* 474. *Barlow v. Wiley*, 3 *A. K. Marsh.* [Ky.] R. 457.) If an infant and one of full age are made executors, and an action is brought against them, he that is under age must appear by guardian for the defense. (*Weld v. Rumney*, 2 *Sto. R.* 784.)

It would seem that in replevin against several, if the defendants appear by attorney and avow as bailiffs, and one of them is an infant, yet it is no error; for they all make one bailiff, and appear in *autre droit*, or another's right. (*Coan v. Bowles*, 1 *Shower's R.* 165.)

The guardian *ad litem* cannot bind the infant defendant in any thing except in the ordinary proceedings in the suit. The declarations of the guardian are not evidence against the infant, and he has no power to release the interest of any person so as to render him competent as a witness. (*Fraser v. Marsh*, 3 *Eng. C. L. R.* 308. *Cowling v. Ely*, *Ib.* 447.) And it seems that an infant will not be bound by his own release given on the trial to qualify a witness, though his guardian *ad litem* join therein, unless it be *bona fide* a sufficient satisfaction of the debt due him. (*Walker v. Ferrin*, 4 *Vi. R.* 523.)

§ 142. The next friend or guardian of an infant plaintiff is primarily responsible to the defendant, and to the plaintiff's attorney or solicitor, for the costs of the suit. The infant himself is not liable to pay the costs of the defendant in any event; but if in the end the complaint is dismissed with costs, or if costs are given as against the plaintiff at any step of the proceedings, the question arises whether these costs are ultimately to be borne by the infant or by the guardian, or *prochein ami*. The rule laid down by Lord Thurlow in this regard is, that no degree of mistake or misapprehension will be sufficient to charge a *prochein ami* with costs; and that any one who will stand forward in that character on the behalf of infants, is to be encouraged to every possible

extent which he can be supposed to intend the infant's benefit. (*Whitaker v. Marlan*, 1 *Cox's Cas.* 285.) Lord Hardwicke held that if it appears that the next friend was sufficiently warranted in bringing suit, and that it was brought on and continued in a reasonable manner, and without laches, then the infant ought to reimburse him. (*Taner v. Ivie*, 2 *Ves. Jr. R.* 466.) But the costs will not be charged on the infant's estate, unless the court is satisfied the suit was brought in good faith, and with the *bona fide* intent to benefit the infant. (*Pearce v. Pearce*, 9 *Ves. R.* 547.) This is substantially the rule in this country. If a bill is filed on behalf of an infant by his next friend, and the bill is dismissed or a decree is made in the cause before the infant is of age, he cannot be personally charged with costs. They are to be charged against the next friend, unless there is a fund under the control of the court belonging to the infant, in which case the court may direct the costs to be paid out of that fund. (*Waring v. Crane*, 2 *Paige's Ch. R.* 79, 81.) This is the practice in a court of equity where the whole subject of costs is, in general, in the discretion of the court. But in a court of law, if the defendant recover costs against the plaintiff in an action brought by a guardian or *prochein ami* for an infant, the infant plaintiff is not liable for those costs, but the guardian or *prochein ami* is. (*Sproule v. Botts*, 5 *J. J. Marsh. [Ky.] R.* 162. *Perryman v. Burgster*, 6 *Port. [Ala.] R.* 99. *Bouche v. Ryan*, 3 *Blackf. [Ind.] R.* 472.)

By construction of a statute in Massachusetts, an infant plaintiff seems to be liable for costs to the defendant, and the *prochein ami* is not. (*Smith v. Floyd*, 1 *Pick. R.* 275. *Crandall v. Slaid*, 11 *Metc. R.* 288.)

In North Carolina, if an infant plaintiff becomes nonsuit, he is liable for the defendant's costs, and a *fieri facias* may issue against his property. (*Howett v. Alexander*, 1 *Dev. R.* 431.) But in Kentucky, the mode of compelling the payment of the defendant's costs recovered against an infant plaintiff is by attachment against the next friend, and not by execution (*Willson v. McGee*, 2 *A. K. Marsh. R.* 601); and upon the reversal of a judgment obtained by an infant in the name of his next friend, the judgment and costs go against the *prochein ami*. (*Yeiger v. Stone*, 7 *Mon. R.* 189.)

§ 143. In all cases of actions against infant defendants, the same rule with respect to costs applies as in the case of adults, and costs

are given much upon the same principle as in suits by and against adult parties. In actions at law the rule with respect to costs is peremptory, and applies equally to infants and adults. In actions and proceedings in equity, the matter of costs is often in the discretion of the court, and in those cases the fact of infancy added to the other circumstances may be considered, to relieve the defendant from the payment of the plaintiff's costs, when costs might be imposed against an adult.

An infant who prosecutes an unjust claim at law, and compels the other party to come into equity for relief, and then sets up an inequitable defense, will be adjudged to pay the costs of the plaintiff in the equity suit. (*Price v. Sykes*, 1 *Hawkes'* [N. C.] R. 87.)

In the State of Maryland, it is held that an infant defendant is liable to pay the plaintiff's costs, and that a *capias ad satisfaciendum* may issue to recover them. (*Lane v. Gover*, 1 *Harr. & McHenry's* R. 459.)

In England, it has been said that the guardian of an infant defendant is liable *prima facie* for costs; and he is personally liable to costs if the answer be reported scandalous or impertinent; but where no misconduct is imputed to the guardian *ad litem*, he seems to stand on the same footing with regard to costs as the *prochein ami* of an infant plaintiff. (*McPherson on Infancy*, 432.)

In one case an infant defendant was brought up by the messenger to have a guardian assigned him to defend the suit, and Lord Hardwicke said that an infant defendant pays no costs of a contempt; that the plaintiff always pays the messenger. (*Perkins v. Hammond*, *Dick. R.* 287.) In another case, a solicitor, without authority, caused an appearance to be entered for an infant defendant, and the appearance was ordered to be set aside, and the solicitor to pay costs. (*Richards v. Dudley*, 2 *Dan. C. P.* 1.) So also, it has been said: "Although an answer confesses every thing that is prayed [alleged] by the bill, so that the plaintiff, in that case, need not be at the trouble of proving it, yet, if the defendants are infants, the court will compel the plaintiff to prove every thing; which he did, and had a decree; whereupon it was prayed, that the plaintiff should have costs of all, and not for the bill and answer only, which was granted." (2 *Equity Cases*, abridged, 237, note 1. *And vide Hill v. Omeshee*, 12 *Ill. R.* 160.)

The decree in a suit for partition directs the costs of infants to be borne by their share of the property. (*Agar v. Fairfax*, 17 Ves. R. 557.) This is the rule generally both in England and in the United States; and in this respect it is the same with infants as with adults.

CHAPTER XIII.

HOW INFANCY IS TRIED—BURDEN OF PROOF—THE RIGHT OF PAROL DEMURRER—DAY TO SHOW CAUSE AGAINST A DECREE—EFFECT OF THE JUDGMENT OR DECREE AGAINST AN INFANT.

§ 144. It has been laid down as a rule, that when it is alleged in the pleading that the party was and still is an infant, the fact must be tried by inspection of the court; but that when the party is of full age, at the time of the plea, then it will be tried *per pais*. But as to judicial acts, or acts done in a court of record, that the trial of infancy must be by inspection, and, therefore, if an infant levies a fine and attempts to reverse it, the writ of error must be brought during his minority, so that the court may by inspection determine the age of the infant; although the judges, as by *adjuncta*, may in such cases inform themselves by witnesses, church books and other evidence; and by the same rule, if an infant suffered a recovery by appearing in person, this had to be reversed by inspection of the judges during his minority. (*Bing. on Inf.* 142, and *authorities cited*.)

By the old practice in England, an infant could not properly be cognizor in a fine; but if the judge or commissioners whose duty it was to see that persons acknowledging fines before them were of age, and who were liable to be fined if they neglected their duty, permitted an infant to levy a fine, it was presumed that he was of full age, and he could not impeach the fine on the ground of his disability in the court in which it was levied. (*Mansfield's case*, 12 Coke's R. 123. *Hearle v. Greenbank*, 3 Atk. R. 711.) But if the infant brought a writ of error in a superior court during his minority, the fact of infancy was tried, not by jury but by inspection of his person in open court; and the judges might require his appearance for that purpose, examine him or his relations and inform themselves by any kind of evidence. (*McPherson on Inf.*

461.) If upon inspection the party was found not to be of full age, the fine was reversed; and when it had been once adjudged and recorded upon such an inspection that he was within age, then though he attained his full age or died before the fine was reversed, yet he or his heirs might reverse it afterward. (*Keckwick's case*, *Sir F. Moore*, 844.) So, when there was a protection, which rendered it impossible to proceed in the cause against the cognizee, the infant might be inspected under age, and the fine avoided whenever the protection ceased. (*Co. Litt.* 131 a, 180 b. *Vide also*, *McPherson on Inf.* 462.)

The common law rule may still prevail in England, but the trial by inspection is no part of the law of this country. In the United States, the fact of infancy is tried in the ordinary manner of other facts, by a jury. (*Ryeson v. Grover*, *Cox's [N. J.] R.* 458. *Sliver v. Shellbach*, 1 *Dallas' [Pa.] R.* 165.) The fact is tried at the same place and before the same tribunal as the other facts of the case; that is, the venue in cases for or against an infant is laid in the place required by the practice in other cases; although the law of the domicile of birth governs the state and condition of the minor, into whatever country he removes, and his minority ceases at the period fixed by those laws for his majority. (*Ante*, § 4.) For instance, if a female at the age of nineteen years should make her promissory note in the State of Nebraska or Vermont, where females are declared to be of full age at eighteen years, and an action should be brought to recover the amount of such note in the State of New York, where a female is an infant until she is twenty-one years of age, her plea of infancy will not defeat the note, although she might on the day of trial be under the age of twenty-one years, certainly not unless the note was made payable in a place where the maker would be considered an infant at the time the note was made.

§ 145. When infancy is interposed as a defense, or is otherwise material in an action or other judicial proceeding, the burden of proving it is upon the party setting it up. Thus, if a person pleads his infancy to avoid a contract executed by him, the proof of infancy lies on him, and this rule will not be departed from, even where the plaintiff replies a new promise after twenty-one, for the reason that the fact of infancy is supposed to rest more immediately within the infant's knowledge, while it may be absolutely impossible for the adverse party to prove the con-

trary, though the contrary were true. For example, in the State of New York, where the action was upon a promissory note, the defendant pleaded infancy and the plaintiff replied that the defendant ratified and confirmed the promise after he had attained to the age of twenty-one years, upon which the defendant took issue, it was held that the plaintiff was *prima facie* entitled to recover upon proof of a new promise, without showing that the defendant was of age at the time of making the new promise. (*Bigelow v. Grannis*, 4 *Hill's R.* 206.) It has also been held by the English courts, that in such cases the burden of proving infancy is still on the infant. (*Hostley v. Wharton*, 39 *Eng. C. L. R.* 276. *Bosthwick v. Carruthers*, 1 *Term R.* 648. *Leader v. Barrey*, 1 *Esp. R.* 253. *Jenne v. Ward*, 2 *Stark. R.* 326.)

So in another case in the State of New York, where the action was upon a promissory note, to a replication to a plea of infancy, setting up a ratification of the promises after the defendant came of age, the defendant rejoined denying such ratification after he came of age, it was held that the plaintiff might give evidence of such ratification at any time after the making of the original contract and that it was then for the defendant to show that he was still a minor at the time of such ratification. (*Bay v. Gunn*, 1 *Denio's R.* 108.) The course of pleading, however, may be such as to dispense with the proof of infancy. Upon the issue of necessities or not, when specially pleaded, no evidence of minority is requisite, the fact being admitted by the course of pleading: the burden of proving the issue of necessities, in such a case, is on the plaintiff. (2 *Greenleaf's Ev.* § 364.)

§ 146. The fact of infancy may be proved by the testimony of persons acquainted with the party from his birth, and who can speak from recollection upon the subject. The fact may also be proved, like other facts in the case, by the admissions of the party; for, although the party can know nothing personally of his birth, when he asserts what his age is, it is presumed that he speaks from information which is reliable. The admissions of an infant, generally, are competent evidence against him, both in *civil* and *criminal* cases, when they relate to a matter for which the law holds him accountable. (*Haile v. Lillie*, 3 *Hill's [N. Y.] R.* 149. *McCoon v. Smith*, *Ib.* 147. *Rex v. Thornton*, 1 *Moody's R.* 29. *Mather v. Clark*, 2 *Aik. [Vt.] R.* 209.) But the admissions of an infant should be weighed cautiously with reference to his age and under-

standing. (*The State v. Guild*, 5 *Halst. [N. J.] R.* 163, 189, 190.) Church books also have been held to be competent evidence to go to a jury to establish the fact of infancy. (*Bostwick v. Carruthers*, 1 *Term. R.* 648.) An almanac, in which a father had written the nativity of his son, was allowed to be strong evidence. (*Herbert v. Truckal*, 1 *Raym. R.* 84.)

The entry of the baptismal register of the infant's birth is no proof of his age. (*Rex v. Clapham*, 19 *Eng. C. L. R.* 260. *Wilson v. Law*, 14 *ib.* 163. *Burghart v. Augustein*, 25 *ib.* 641.) It seems, however, that if the entry was made by the parents, it may be admitted as their *declaration*, and, in the ecclesiastical court, it is strong adminicular evidence of minority. (2 *Greenl. Ev.* § 363. *Agg v. Davies*, 2 *Phill. R.* 345.)

The infant's own affidavit of his infancy, together with proof of the registry of his baptism, was held not sufficient proof to justify the court in setting aside a warrant of attorney on the ground of infancy. (*Tyr. & Gr. R.* 512. *Weaver v. Stokes*, 1 *Mees. & Wels. R.* 203.)

In the United States, where births are required to be recorded, the original record, or a copy thereof, is usually received as sufficient evidence of the fact it recites, which it is the duty of the officer to record. (2 *Greenl. Ev.* § 363, note 4.)

Parish registers of places out of the country where they are offered in evidence, are regarded with less confidence than those of the place wherein they are offered; and Lord Kenyon, it seems, when Master of the Rolls, refused to receive a register of the neighboring island of Guernsey. (*Hunt v. Lellisurrier*, 1 *Cox's R.* 275.)

It seems that the entry of baptism contemporaneously made by a Roman Catholic priest, in the discharge of his ecclesiastical duty, in his church record of baptisms, is competent evidence, after his death, of the date of the baptism, if the book is produced from the proper custody; although he was not a sworn officer, and the record was not required by law to be kept; so held by the supreme judicial court of Massachusetts, in a very late case. (*Kennedy v. Doyle*, 10 *Gray's R.* 161.) This was upon the ground that the death of the priest made his register evidence, upon the same principle that an entry of tithes in the books of a deceased rector, the books of charges of a deceased attorney, or those of a deceased solicitor, for professional services, memoranda, signed by an attorney of his

having served an order or notice, and an entry made by a deceased clerk, in a notary's book, of the dishonor of a bill of exchange, and the like, are competent evidence of the facts therein stated, which has been admitted in a great number of cases, both in England and in this country. The ground of the admission of such evidence, is stated by Lord Chief Justice Tindal, in the case of the entry in the notary's book, "that it was an entry made at the time of the transaction, and made in the usual course of business, by a person who had no interest to misstate what had occurred." (*Poole v. Dicus*, 1 *Bing. N. C.* 652.) In a very early case, the supreme court of Connecticut admitted the record of a baptism by a minister of a parish, who had since died, as evidence of the fact of baptism. (*Huntley v. Compstock*, 2 *Root's R.* 99.) And it has often been held in the commonwealth of Massachusetts, that the book of a bank messenger or a notary public, kept in the usual course of business, though not required by law, is competent evidence after his death. (*Walsh v. Barret*, 15 *Mass. R.* 380. *Porter v. Judson*, 1 *Gray's R.* 175.) Similar decisions have been made by the supreme court of the United States, and by other American courts of authority. (*Nicholls v. Webb*, 8 *Wheat. R.* 326. *Gale v. Norris*, 2 *McLean's R.* 471. *Sheldon v. Benham*, 4 *Hill's [N. Y.] R.* 131. *Nourse v. McCoy*, 2 *Rawle's [Pa.] R.* 70.) On these authorities, the record of baptisms of the Massachusetts deceased Roman Catholic priest, was admitted as evidence of the date of the particular baptism.

§ 147. By the feudal law, the guardian having the whole profits of the estate, that he might be enabled to breed the infant up to arms, was not admitted, where the right of inheritance was in demand, to prosecute or defend for the infant; and the infant, being incapable of acting for himself, the action was in such cases suspended till he came of age. Hence in all cases where a naked right in fee descended from an ancestor to an infant, then in every action ancestral brought by the heir within age, the parol was required to demur, for the law judged it less prejudicial that the infant be delayed of his right, than that he should run the hazard of losing it forever, which he might be in danger of by his want of knowledge in setting forth his title; and the parol was required to demur in equity the same as in law. (*Bing. on Inf.* 145, 146.) There were various other cases in which the parol demurrer was required, but the doctrine long since was rendered inapplicable

except in debt against the heir on the bond of his ancestor, and now the right of parol demurrer is abolished in England, by statute, and it is of no consequence to dwell upon the subject. (11 *Geo. IV*, and 1 *Wm. IV*, *ch.* 47.)

The parol demurring stayed all proceedings in the suit, except that a receiver was sometimes appointed. (*Sweet v. Partridge*, 1 *Cox's R.* 433.) The right of the parol to demur is abolished in the State of New York, and the doctrine is scarce recognized in any of the American States at the present time, and especially in cases of devise or descent.

§ 148. According to the old and well settled rule of practice in a court of equity, in cases against an infant, a day was given the infant defendant when he came of age, usually six months, to show cause against a decree, and make a better defense, and the defendant was called in for that purpose by the usual process of the court to obtain jurisdiction of the person of the defendant; and this is the general rule at the present day, except in cases specially provided by statute. The decree in ordinary cases which does not give a day will be bad on the face of it, and will be reversed on appeal for that error alone, or will afford ground for a bill of review. (*Thomas v. Gyles*, 2 *Vern. R.* 232. *Cary v. Bertie*, *Ib.*, 342. *Eyre v. Shaftsbury*, 2 *P. Wms. R.* 120. *Napier v. Effingham*, *Ib.* 401. *Bennett v. Lee*, 2 *Atk. R.* 529. *Kelsall v. Kelsall*, 2 *Mylne & Keene's R.* 409. *Jackson v. Turner*, *Leigh's [Va.] R.* 119. *Buler v. Bullitt*, 4 *Bibb's [Ky.] R.* 11. *Collard's Heirs v. Groom*, 2 *J. J. Marsh. [Ky.] R.* 487, 488. *Jones' Heirs v. Adair*, 4 *ib.* 220. *Arnold's Admr. v. Voorhies*, *Ib.* 507, 509. *Passmore's Heirs v. Moore*, *Ib.* 591, 593. *Harlan v. Barnes' Admr.* 5 *Dana's [Ky.] R.* 219, 223. *Lee v. Braxton*, 5 *Call's [Va.] R.* 459.

Although the right of the parol to demur is abolished in England, the rule of the English courts still continue to give the infant a day. In a foreclosure suit it has been lately held in the English court of chancery that the decree must be taken, reserving a day for the infant to show cause, and that there is nothing in the trustee act of 1850 to alter the rights of the infant. (*Newberry v. Martin*, 2 *Eng. Law and Eq. R.* 106.)

There seems to be a distinction made in England between certain mortgage cases. When the decree directs the mortgaged premises to be sold, the infant has not his day to show cause; but on a decree of a simple foreclosure, the infant is allowed his six

months to show cause against the decree. (*Booth v. Rich*, 1 *Vern. R.* 296. *Godier v. Ashton*, 18 *Ves. R.* 83. *Williamson v. Gordon*, 19 *ib.* 114. *Scholefield v. Heafield*, 7 *Simons' R.* 667. *Vide also Powys v. Mansfield*, 6 *ib.* 637. *Matlock v. Galton*, 3 *P. Wms. R.* 352.)

The rule in the State of New York is substantially the same as in England, except that in cases of strict foreclosure in England the infant is allowed six months after he comes of age to show cause against the decree (*Mallach v. Galton, supra*); whereas, in New York, the time allowed for redemption, upon a bill for strict foreclosure, is not certain, but rests in the discretion of the court. (2 *Barb. Ch. Pr.* 190. *Perine v. Dunn*, 4 *Johns. Ch. R.* 140.) However, it has been held that, except in cases specially provided by statute, an infant defendant is entitled to six months after his coming of age to show cause against a decree affecting his title to real estate. When a deed to the infant's ancestor was set aside as fraudulent, the court directed a clause to be inserted in the decree giving him such day. (*Harris v. Youman, Hoff. Ch. R.* 178.) And in another case it was held that a decree against infants setting aside a conveyance made in trust for them, which decree contains no provision allowing them a day to show cause after they shall become of age, is erroneous, and is not conclusive upon them; and further, that if the infants have any valid interest in the trust property, they are entitled to relief in a court of equity, and that the error for not inserting the provision allowing such day may be corrected either by original bill or by bill of review. (*Wright v. Miller*, 1 *Sand. Ch. R.* 103. *Ib.* 4 *Barb. R.* 600. *Ib.* 4 *Seld. R.* 9.)

In the State of California, the supreme court has held that a decree against an infant without giving him a day to show cause against it, deprives him of no rights which the law gives him. (*Regla v. Martin*, 19 *Cal. R.* 463.)

In a mortgage case, if, instead of seeking a foreclosure of the mortgage against the infant heir of the mortgagor, there is a decree for the sale of the mortgaged premises, the decree, as in England, will bind the infant; and a sale is usually regarded as the most beneficial to both parties. (*Mills v. Dennis*, 3 *Johns. Ch. R.* 367.)

§ 149. In the late court of chancery of the State of New York, the doctrine of the demurring of the parol, and the giving a day to an infant to show cause, has been carefully examined, and the distinction between the practice in the two cases distinguished.

The suit was brought to set aside the deed of an infant's ancestor for fraud, and the court determined to set the deed aside. Some of the defendants were infants, and in considering the question as to giving them a day to show cause, the assistant vice-chancellor, the Honorable Murray Hoffman, said: 'In the case of *Price v. Carver* (3 *Mylne & Craig's R.* 161), this subject was entered into at length. The bill was by an equitable mortgagee for a foreclosure, and the decree as finally settled was, that the infant upon coming of age convey the premises, with the usual clause that the decree be binding upon him, unless upon being served with a subpoena he show cause against it within six months after coming of age.' The lord chancellor then notices the difference between the parol demurring and the giving a day to show cause. He considers that the parol demurred in equity only when it demurred at law, and cites *Plasket v. Beeby* (4 *East R.* 485), as well explaining the origin and limits of the rule at law.

"From the case of *Price v. Carver*, and that of *Lechmere v. Brasier* (2 *Jac. & Walker's R.* 281), it appears, that when real estate descended to an heir at law, and there was not a trust power to sell, specialty creditors could not obtain a sale of the real estate until the infant came of age. But if there was a devise in trust to sell, or a power to sell and convey, so that a deed could be executed by another competent to transfer the legal title, the parol could not demur, nor was a day given to show cause. (*Black v. Wilder*, 1 *West's R.* 341.) And when a sale was directed to be made, but no power given to executors or others to make it, and therefore the estate descended to the infant heir, clothed with a trust to sell, the parol did not demur, but a day was given to show cause against the decree, upon coming of age, and the conveyance was not to be executed until then. (*Uvedale v. Uvedale*, 3 *Atk. R.* 118. *Black v. Wilder*, *ut supra*. *Pope v. George*, 4 *Ves. R.* 370 n.) It was said by Lord Hardwicke (*Sheffield v. Buckingham*, *West's R.* 684), that he took it to be the course of the court, not to give a day, unless a conveyance is directed, either in form or substance. And in *Wilkinson v. Oliver* (4 *Hen. & Munf. R.* 450), it is said, that whenever an infant is decreed to do an act, he must have six months given him after coming of age in the decree; but not when lands are decreed to be sold, unless he is to join in the conveyance. See also *Bingham v. Clanmorris*, 2 *Molloy*, 393. But a careful examination of the cases shows that, even upon the foreclosure of mortgages,

this clause is inserted. (*Matlock v. Galton*, 3 *P. Wms. R.* 352. *Lyne v. Wallis*, *Ib. n.* *Williamson v. Gordon*, 19 *Ves. R.* 114.) I apprehend the English rule to be, that, except in special cases, such as where there is an equitable mortgage only, no conveyance is ordered upon a bill of foreclosure. The legal title passed by the English doctrine, under the mortgage, and the equity in this court was extinguished by the foreclosure. (3 *Powell on Mortgages*, 965, 988. *Williamson v. Gordon*, *ut supra*.) So in our court in former times, the decree declared only the equity of redemption barred, and ordered a delivery of title deed. (*Browne v. Gold*, 16th May, 1800, *Knox v. Pollock*, 3d July, 1800; *Cooper v. Kirkland*, 11th August, 1800.) In the case of *Pye v. Danbury* (3 *Bro. C. R.* 595,) a mortgage was made in fee, when the party was only tenant in tail, and there was a covenant for further assurance. This was held binding on his assignees, he having become bankrupt, and it was urged that they were bound to suffer a recovery. The decree was for them to execute proper conveyances upon being foreclosed. Here the title under the mortgage as it stood was not perfect.

“The leading case of *Spencer v. Bangs* (4 *Vesey's R.* 370), illustrates the English rule. There copyhold lands were mortgaged in fee by lease and release. There was a covenant for further assurance. This was held to bind the customary heir. But, as he was an infant, the decree (the bill being for foreclosure) was that an account be taken, etc., and upon the defendant's paying to the plaintiffs the amount reported due, etc., the plaintiffs were to reconvey, but, in default of such payment, the plaintiffs were to be let into possession of the premises, and to hold the same until the defendant should attain twenty-one years of age, and upon attaining that age the defendant was to surrender the mortgaged premises, and the decree was to be binding upon the infant, unless, etc. So, *Price v. Carver*, before cited, and *Scholefield v. Heafield* (7 *Simons' R.* 670), were cases of equitable mortgages. Again, in *Eyre v. The Countess of Shaftsbury* (2 *P. Wms. R.* 120), it is said by Sir Joseph Jackyll, that in all decrees against infants, even in the plainest cases, a day must be given to show cause when they come of age. The case of *Sir John Napier v. Effingham* (1 *P. Wms. R.* 401, 3 *Br. P. C.* 1), is much in point. The infant brought a bill to be relieved against several settlements unduly obtained; and the defendant, Lady Effingham, brought a cross-bill to have a conveyance to an estate settled on her by a particular deed, and for other

purposes. A decree was made, among other things, dismissing the original bill, as to a particular settlement. On an appeal to the House of Lords, so much of the decree as directed the dismissal of the plaintiff's bill, in relation to a settlement of July, 1818, was affirmed, with the addition of the words, 'unless the plaintiff, Sir John Napier shall,' etc. And, as the cross cause was also before the court, the decree further directed that the trustees should convey, 'unless the said John should, within six months,' etc. We see in this decree an example of a conveyance by trustees respited, until the infant, who would have otherwise inherited the lands, came of age. When the cause was afterward before the court of chancery, upon a petition of Sir John Napier, upon coming of age, leave was given him to amend his answer to the cross-bill, and to rehear the causes. And the court say that all decrees against infants give six months after they come of age to show cause. But the amending the original bill, after a dismissal upon the merits, was held to be without precedent, and refused. This order was affirmed by the lords. (3 *Brown's P. C.* 301.) See also *Kelzal v. Kelsall* (2 *Mylne & Keene's R.* 409), in which Lord Brougham went carefully into the cases respecting an infant's rights to make a new defense, and the principles on which they proceed.

"Sales in England have sometimes been ordered upon bills of foreclosure, with the mortgagor's consent, and, I suppose, upon the general right of a specialty creditor, to obtain a sale. (*Monday v. Monday*, 1 *Vesey & Beames' R.* 223. *Seaton on Decrees*, 274.) But prior to the statute (1 *Wm. IV*, *ch.* 47, § 1) the infant was not to convey until of age, and, of course, had his day. By that act, when any suit is instituted for the payment of debts, and a decree of sale is made, the court may compel the infant to execute conveyances, which shall be as effectual as if the infant was of full age.

"It appears to me, as the result of these authorities, that, in England, independent of statutory provisions, the rule generally is, that, whenever the inheritance of an infant is bound by a decree, there must be a day given him to show cause, whether a conveyance is decreed or not. The parol demurrer stays all proceedings in the suit, except that a receiver will sometimes be appointed. (*Sweet v. Partridge*, 1 *Cow's R.* 433.) But when the cause goes on, the decree is completed, with a respite of conveyance if necessary, and with a day to show cause, whether they are requisite or not. I have already noticed some exceptions.

“In applying these rules of the English court to cases in our own state, there are some instances in which statutory provisions remove all difficulty. Under the act of 1813 (1 *R. L.* 316), the privilege of the parol demurring was abolished; the action was not to be delayed by reason of the nonage of the heir or devisee sued. By the present law, suits against heirs and devisees are not to be suspended by reason of their infancy, but guardians are to be appointed as in other cases. (2 *R. S.* 454, § 43.)

“Suits may now be prosecuted against heirs and devisees jointly, either at law or in equity, to charge them with the debts of the ancestor, on account of lands descended. (2 *R. S.* 456, § 60. *Laws* 1837, p. 537, §§ 73, 74. *Parsons v. Browne*, 7 *Paige's R.* 360.) When it is found that the heir has lands descended to him not aliened at the commencement of the suit, the court is to decree that the debt be levied of such real estate descended. (2 *R. S.* 454, § 47.) And by section 54, execution on this decree, when the devisee or heir is an infant, is suspended for one year. (See also 1 *R. L.* 1813, § 6.)

“Now, by the statute of 11 George IV and 1 William IV, chapter 47, section 10, the abolition of the right of the parol to demur is made in terms even more comprehensive and decisive than is our own act. Yet Lord Cottenham, in *Price v. Carver*, proceeds upon the distinction between the parol demurring and giving a day to show cause, and holds the latter requisite when the former was abolished. Under our statute the debt is to be levied by execution, and a sale is made by the sheriff. No conveyance is therefore necessary from the infant. But still the point is not reached whether the day to show cause must not be given, and all the consequences of making a new defense be allowed.

“In partition cases in England, the parol does not demur at law, nor has the infant a day to show cause. But in equity, although a decree be made, conveyances must be executed, and are respited in cases of infancy until the arrival at age of the party. In our own courts, conveyances were held unnecessary under the old statute. The decree was the same as the judgment at law. When a sale is ordered in a partition suit, the provisions of the statute are so ample and decisive as to dispense with the necessity of giving the infant a day.

“In mortgage cases it was formerly the course of our courts to direct a sale by the sheriff when the mortgagor was absent or con-

ceased, and in ordinary cases to decree it under the direction of a master, with all proper parties to join in the deed. See the statutes and cases, 2 *Hoffman's Ch. Pr.* 95, note 3. In *Lawler v. Durry*, 10th January, 1801, such a decree was made, with a day given to the infant to show cause, six months after coming of age, upon being served with a subpoena. A like decree was made in *Gardner v. Robertson*, 15th September, 1800. In April 1801, the first act was passed authorizing sales and conveyances by a master. (1 *Webster & Skin.* 443, § 13.) The provision is contained in that act which has been adopted in every subsequent statute, that the master's deed should be of the same validity as if executed by the mortgagee and mortgagor, and be an entire bar against them and their heirs. From that time I presume no decree in such a case has given a day to show cause. And by the statute and the universal practice the omission is fully sanctioned.

"It may be that the doctrine in our state respecting mortgages is so entirely changed as that even upon a bill of strict foreclosure, a conveyance by the mortgagor should be decreed, and in a case before me, in October Term, 1839, I directed a clause to be inserted that the complainant might, if advised, compel a release from the mortgagor, without, however, it being deemed essential. If the heir was an infant, of course in such a case a day must be given. If, on the other side, the bill is to redeem a mortgage, a declaration and decree that it is satisfied might be sufficient. The execution of a satisfaction given is of course so. But if either this or a conveyance was deemed necessary, and the infant was an heir, there would be something for him to do, and he must have his day.

"In *Braxton v. Lee's Heirs* (4 *Hen. & Munf. R.* 389), commissioners were appointed to set out dower, and they awarded that the guardian of the infant should pay at the rate of \$50 per annum for rents and profits from the time the bill was filed, the decree was held void, among other things, for not giving the infant a day to show cause.

"In *Wilkinson's Admr. v. Olien's Representatives* (4 *Hen. & Munf. R.* 450), there was a decree for sale of lands to pay debts; commissioners to conduct it. The chancellor said, when the infant is decreed to do an act, as when he is foreclosed, a day is given. But not when lands are decreed to be sold, unless he is to join in the conveyance. Commissioners execute deeds in Virginia where a sale of land is decreed.

"Upon the whole, I consider the rule is broader than Lord Hardwicke stated it in the single case referred to, and that in general the infant must have his day when his inheritance is affected." (*Harris v. Youman*, *Hoffman's Ch. R.* 178, 185.)

This case was decided a quarter of a century ago, but the rule with respect to the parol demurrer, and giving day to the infant is, in principle, the same now as it was then; and as the practice in these cases is so little understood by the profession, it was thought best to give the case *in extenso*, as containing an epitome of the practice upon this very important subject, both in England and in this country. In a word, it may be averred that the parol demurrer is abolished, but that a day must be given to the infant when he comes of age, usually six months, to show cause against a decree affecting his title to real estate, except in cases specially provided for by statute, and that this is the rule of practice both in this country and in England.

§ 150. An infant who has a day given to him, after he comes of age, to show cause against a decree, cannot assail the decree in any mode he pleases by that day, but must first obtain the leave and direction of the court. (*Field v. Williamson*, 4 *Sand. Ch. R.* 613.)

But in a case where a day has been given to show cause, an infant, before he comes of age, may apply for leave to put in a better answer. This permission will not be granted as a matter of course, but it must depend upon the circumstances shown to the court. (*Bennet v. Lee*, 2 *Atk. R.* 529.)

In the State of Virginia it is provided by statute, that an infant defendant may have six months after he comes of age, to show cause against a decree entered against him, and if the decree be reversed, he will have restitution of the proceeds of any sale under it, although it is declared that the sale shall be valid. (*Code of 1849*, *ch.* 178, §§ 7, 8.)

If the infant succeeds in showing that the decree ought not to have been made, the court will place him, so far as is conveniently practicable, in the situation in which he was before the decree was made. (*Pope v. Lemaster*, 5 *Littell's [Ky.] R.* 80. *Prutzonan v. Pitesell*, 3 *Harr. & Johns. [Md.] R.* 77, 82.) It is held, however, that a decree need not give a day to infant complainants, as they have no right to overhaul the decree. (*Williamson's Heirs v. Johnston's and Nash's Heirs*, 4 *Monroe's [Ky.] R.* 253, 255. *Jameson v. Manley*, *Ib.* 414, 416. *Hanna v. Spott's Heirs*, 5 *B.*

Monroe's [Ky.] R. 362, 367. *Brown v. Armistead*, 6 *Randolph's* [Va.] R. 574, 602.) And in all cases of judicial acts of the court which are performed under an authority not derived from the infant, the same are binding upon them and conclusive; such as decrees of sale under mortgage, or under a power in a will to sell, hereinbefore referred to. (*Vide Mills v. Dennis*, 3 *Johns. Ch. R.* 367, 369. *Brown v. Armistead*, *supra*.)

It was doubted in ancient times, whether a recovery barred an infant who appeared by his guardian, but it was afterward settled, that if an infant appeared by guardian and vouched the common voucher, and so suffers a recovery, it could not be reversed for error. If the recovery was to the infant's prejudice, he had his remedy against the guardian. (*McPherson on Inf.* 463, and cases cited.) And it may be submitted as a general proposition, that an infant can make no new defense after decree, unless the decree itself gives him a day to show cause against it, a permission which would be unnecessary if infants could, in all cases, make a new defense after the decree, whenever they came of age; and that in all other cases he is finally bound. (*McPherson on Inf.* 429.) Of course a judgment against an infant in cases of tort, or contracts which are absolutely binding upon him, is as conclusive upon him as upon an adult, and a judgment in partition is binding on an infant defendant, although in all cases the judgment must be regularly entered upon the appearance of the infant, by his guardian *ad litem*. (*Vide Croghan v. Livingston*, 17 *N. Y. R.* 218. *Althouse v. Radde*, 3 *Bosw. [N. Y. S. C.] R.* 410. *Vide also ante*, § 120.)

CHAPTER XIV.

OF INFANTS IN VENTRE SA MERE—WHEN CONSIDERED IN ESSE—WRIT DE VENTRE INSPICIENDO—OF POST-TESTAMENTARY CHILDREN—OF ILLEGITIMATE CHILDREN.

§ 151. AN infant in *ventre sa mere*, is a child in its mother's womb, and for the benefit of the child the civil law reputes an infant in its mother's womb in the same condition as if born. (*Godolph. Orph. Leg.* 102.) It is also well settled, both in England and in this country. that an infant in *ventre sa mere* is

deemed to be *in esse*, or in being, for the purpose of taking a remainder, or any other estate or interest which is for his benefit, whether by descent, devise, or under the statute of distribution. (4 *Kent's Com.* 249. *Mogg v. Mogg*, 1 *Meriv. R.* 655. *Clarke v. Blake*, 2 *Bro. Ch. R.* 320. *Cooper v. Forbes*, *Ib.* 63. *Trower v. Butts*, 1 *Sim. & Stu. R.* 181. *Beale v. Beale*, 1 *P. Wms. R.* 244. *Northey v. Strang*, *Ib.* 342. *Burdet v. Hopegood*, *Ib.* 486. *Doe v. Clark*, 2 *H. Bl. R.* 399. *Hale v. Hale*, *Pr. Ch.* 50. *Rawlins v. Rawlins*, 2 *Cox's Cases*, 425. *Thelluson v. Woodford*, 4 *Ves. Jr. R.* 227. *Wallis v. Hodson*, 2 *Atk. R.* 117. *Musgrave v. Parry*, 2 *Vern. R.* 710. *Gibson v. Gibson*, 2 *Freem. R.* 223. *Taylor v. Bydall*, 1 *ib.* 243. *Nurse v. Yerworth*, 3 *Swan's R.* 620. *Pratt's Lessee v. Flamer*, 5 *Harr. & John. [Md.] R.* 10. *Stedfast v. Nicholl*, 3 *Johns. [N. Y.] Cases*, 18. *Swift v. Duffield*, 5 *Serg. & Rawle's [Pa.] R.* 38. *Marsellis v. Thalkimer*, 2 *Paige's [N. Y.] R.* 35. *Jenkins v. Freyer*, 4 *ib.* 47. *Hone v. Van Schaick*, 3 *Barb. [N. Y.] Ch. R.* 488. *Mason v. Jones*, 2 *Barb. [N. Y. S. C.] R.* 229, 251.)

§ 152. By the civil law, a child in *ventre sa mere* may be appointed executor, or may take a legacy. If there be two or more at the birth they may be joint executors or joint legatees of the thing bequeathed. (*Godolph Orph. Leg.* 102.) By the civil law of successions a posthumous child is entitled to the same rights as those who are born in the life-time of the decedent, but only on the condition that the child is born alive and under such circumstances that the law presumes they will survive. Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead or in such an early stage of pregnancy as to be incapable of living, although they be not actually dead at the time of their birth, are considered as if they had never been born or conceived; and this rule of the civil law has been adopted in France. (*Code Napoleon*, art. 725, 906. *Vide Domat Prel. B. tit. 2, n. 1, arts. 4, 5, 6; pt. 2, lib. 2, tit. 1, § 1, arts. 6, 7.*) Domat says: "Still-born children are not counted in the number of children who succeed. And although they were alive in their mother's womb at the time the successions where concerned them fell, yet they have no share in them, for they are considered in the same manner as if they never had been born." (*Domat, supra.*) Children born within the first six months after conception are considered by the civil law as incapable of living;

and, therefore, although they are apparently born alive if they do not in fact survive so long as to rebut the presumption of law, they cannot inherit so as to transmit the property to others. (*Code Napoleon*, arts. 312, 725, 906. *Domat Prel. B. tit. 2*, § 1, art. 5. *Marsellis v. Thalhimer*, 2 *Paige's R.* 41, 42.)

§ 153. The common law upon the subject is similar to the civil and the French law. Thus, by the law of England, a child in *ventre sa mere* may be vouched; is capable of taking; the mother may detain charters in its behalf; a bill may be brought in its behalf; a court of equity will grant an injunction in its favor to stay waste; and the destruction of such a child is murder. (*Musgrave v. Parry*, 2 *Vern. R.* 710. *Bing. on Inf.* 104.) So it is admitted in all the books, that a devise to an infant when he shall be born, and that the freehold shall descend to the heir in the mean time is, good as an executory devise; and whatever doubts were formerly entertained on the subject, it seems now to be agreed that a devise to an infant in *ventre sa mere* is good, though he be born after the testator's death, and he will take by way of executory devise. So also it is clear that if land be devised for life, the remainder to a posthumous child, this is a good contingent remainder, because there is a person in being to take the particular estate, and if the contingent remainder vests during the continuance of the particular estate, *eo instanti* that it determines, it is sufficient. (*Bing. on Inf.* 105. *Snow v. Cutler*, 1 *Sid. R.* 153. *Reeves v. Long*, 1 *Salk. R.* 228.) But it was formerly held that a man could not surrender copyhold lands immediately to the use of an infant in *ventre sa mere*, though he might by way of remainder; for a surrender is a thing executory, and nothing vests before admittance; and, therefore, if there were a person to take at the time of admittance it was sufficient, and not like a grant at common law, which, putting the estate out of the grantor, must be void if there be nobody to take. (*Bing. on Inf.* 105.)

A posthumous child is within a provision in marriage articles for such children of the marriage as should be living at the death of the father or mother, and will take under the statute of distributions. (*Miller v. Turner*, 1 *Ves. R.* 85. *Burnet v. Mann*, *Ib.* 156.) So an infant in *ventre sa mere* is within a devise to "all and every the children of J. C. at twenty-one." (*Cosgrove v. Cosgrove*, 1 *Br. Ch. Ca.* 530. *But vide Hughes v. Hughes*, 3 *ib.* 352.) So also an infant in *ventre sa mere*, who, by the order and course of nature, is

living, comes clearly within the description of a child living at the time of its father's decease. (*Doe v. Clarke*, 2 H. Black. R. 399.) But if a man seised of land in fee die, his wife *privement enciente*, (privily pregnant) with a son, and a stranger abate and die seised, and afterward the son is born, his entry is tolled by the descent, because at the time of the descent he had no right to enter, not being *in esse*, and by consequence had no wrong then done him, and the lord had none but the heir to avow upon at the time of the descent. (*Co. Litt.* 245 b.)

Where the birth of a posthumous child divests an estate which has descended on an heir at law, and such child takes by descent, the intermediate heir retains the profits which accrue during the interval. (*Bassett v. Bassett*, 3 Atk. R. 202. *Goodtitle v. Newman*, 3 Wils. R. 526.)

By the strict rule of the common law, if a person were tenant for life, remainder to his oldest son in tail, and died without issue born, but leaving his wife *enciente*, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder, for the reason that the particular estate determined before there was any person *in esse*, in whom the remainder could rest. But to remedy this hardship, it has been enacted by the British parliament, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's life-time, that is, the remainder is allowed to vest in them, while yet in their mother's womb, and they are entitled to the intermediate profits from the death of the parent. (10 and 11 Will. III, ch. 16.)

§ 154. It seems that in England, in imitation of the civil law, a child in *ventre sa mere*, may be appointed executor, and if the mother bring forth two or three children at that one birth, they are all to be admitted executors. (*McPherson on Inf.* 566.)

An infant in *ventre sa mere*, is regarded as a life in being for the purpose of preventing the alienation of property, and any limitation may be made by way of executory devise, etc., provided the same is to take effect within a life or lives in being, including among those lives, children then in *ventre sa mere*, and twenty-one years beyond the death of such life or lives and the time of gestation, so as to allow for the birth of a child in *ventre sa mere*, that is to say, the time of gestation may be taken both at the beginning and at the end. (*Thelluson v. Woodford*, 11 Ves. R. 149.)

The father may appoint a guardian under the English statute, for an infant in *ventre sa mere*, but the spiritual courts cannot appoint one in such a case. (12 Car. II, *ch.* 24, § 8. *Thelluson v. Woodford*, 4 Ves. R. 322.) "If the daughter, the son being in *ventre sa mere*, be forejudged, it shall bind the son that is born afterward, because he had no right at the time of the forejudgment." (*Co. Litt.* 100 b.) In accordance with this principle, the courts of equity held that, if a decree is made in a cause, and then an infant is born, who if born before the decree would have been a necessary party to the suit, and would have had a day given to show cause against a decree, such an infant shall be bound by the decree. If an infant is born during the progress of a cause, he is bound by all the proceedings up to the time of his birth. (*McPherson on Inf.* 567.)

§ 155. There is an ancient proceeding at common law where a widow is suspected to feign herself with child in order to produce a suppositious heir to the estate. In this case the heir presumptive may have a writ *de ventre inspiciendo*—"of examining the abdomen," to examine, by a jury of matrons, whether she be with child or not; and if the jury find her with child, then she is to be removed by a second writ, issuing out of the court where the first is returnable, to a castle, where the sheriff is to keep her safely till delivered; but if the widow be, upon due examination, found not pregnant, the presumptive heir will be admitted to the inheritance, though liable to lose it again on the birth of a child in due time. This writ is of common right, and it may be had by a person who is entitled only to an estate tail, or by a devisee. A proceeding analogous to this writ has been decreed upon a bill in equity, where a sum of money was devised to a charity on the death of a certain person without issue, that person dying and leaving a widow of ill fame, who pretended to be with child. (*Attorney-General v. La Roche*, cited 2 P. Wms. R. 591.) The writ *de ventre inspiciendo* has been granted against a woman whose husband was alive, but had been near ten years abroad, on the application of a devisee, there being a limitation in the will that if she had a male child within forty weeks after the decease of the testator, with whom she had an illicit connection, it should take previous to the devisee. (*Ex parte Wallop*, 4 Bro. C. C. 90.) But an heir presumptive cannot have the writ in the life-time of his ancestor, because he is not *verus hæres*—a true heir; and on account of the hardship of

separating husband and wife. If, however, the wife marries again soon after the death of her first husband, and feigns herself with child by him, the heir may have this writ; for the taking of the second husband being her own act, cannot bar the heir of his rights once vested in him; and therefore neither she nor her husband can complain of any hardship in the separation. (*Co. Litt.* 8 b. *Tursley v. Fitzhardinge*, 6 *Ves. R.* 260. *McPherson on Inf.* 568.)

§ 155. The severity of the proceedings on the writs *de ventre inspiciendo*, has been greatly relaxed in cases where the widow has married again. Instead of ordering the woman into the custody of the sheriff, to be kept by him till delivered of the child, as the practice is if the party is a widow, the court will permit the wife to remain with her husband, on his entering into a recognizance that she shall not remove from the house they inhabit. That some of the women retained by the sheriff shall see her every day, and that three or more of them shall be present at her delivery, and care has been taken, in more modern cases, to "accommodate the terms of the order of humanity," as far as can prudently be done. (*Vide Theaker's case*, *Cro. Jac.* 685. *Ex parte Bellitt*, 1 *Cox's R.* 297, 300. *McPherson on Inf.* 569.)

In one case, a widow being admitted to be with child, the court fixed on a place agreeable to both parties, where she should be placed and remain until delivered, and where the heir might, from time to time, at proper seasons, and on notice, send women to see her, and to be present when the child was born. (*Ex parte Aiscough*, 2 *P. Wms. R.* 591.) And, in another case, the order was that the writ should lie in the office for a certain time, and if, within that time, the woman chose to submit to an examination by two midwives, to be named by the petitioner, then the writ not to go till further orders, otherwise the writ to issue. (*Ex parte Wallop*, 3 *Bro. C. B.* 99.)

§ 156. The common law doctrine of infants in *ventre sa mere*, seems to be recognized, to its fullest extent, in the United States, although, in some instances, the subject is regulated by statute. Thus, in the State of New York, it is provided by statute that where a future estate shall be limited to heirs or issue, or children, posthumous children shall be entitled to take, in the same manner as if living at the death of their parent. (1 *R. S. part 2, ch. 1, tit. 2*, § 30. 1 *Stat. at Large*, 674.) And, again, that descendants and relatives of an intestate, begotten before the death of the intestate,

but born thereafter, shall, in all cases, inherit in the same manner as if they had been born in the life-time of the intestate, and had survived him. (1 *R. S. part 2, ch. 2, tit. 1, § 18. Stat. at Large, 705.*) By these provisions of the statute, a child in *ventre sa mere* is considered *in esse*, for the purposes of property, and it has been held that the period of gestation, or the time for a posthumous child to be born, is not to be taken into the account, under the statute, in determining the rights of the child; that infants in *ventre sa mere* are placed on the same footing, with respect to property devised, and to property coming by descent, as other children of the same parent. (*Mason v. Jones, 2 Barb. S. C. R. 248, 251.*) The judge who delivered the opinion of the court, in referring to the statute, said: "Here, then, is a complete annihilation, in law, of the time that may elapse between the death of a father and the birth of a previously begotten child. The instant such child is born, it is made to step back to the end of the father's life, there to take its stand and become clothed with all the rights of property previously conferred. The time allowed for an accumulation to commence in *futuro*, is the same as is allowed for a future estate in lands to vest in possession; and when the beneficiary, under a trust for such an accumulation, happens to be in *ventre sa mere*, at the death of the father, the same reason exists why the time that may elapse for his birth should be disregarded," (*Ib. 252.*)

§ 157. At a very early day it was held by the supreme court of the State of New York that when lands were devised to a son for life, remainder to the male children of his son, and the son died leaving a daughter, and his wife *privement enceinte*, who was delivered of a son, the posthumous son took the estate in remainder, by the devise, in the same manner as if he had been born in the life-time of his father. (*Stedfast v. Nicoll, 3 Johns. Cases, 18.*) Judge Radcliff, in giving his opinion in the case, said: "On principles of natural justice, no reason can be assigned why an infant in *ventre sa mere* should not be entitled to the same rights as a child previously born. The civil law (*Just. lib. 2 tit. 13. Domat, b. 2, tit. 1, § 1, par. 6.*), without discrimination, confers on him every beneficial interest; and the common law generally regards him with the same indulgence. It entitles him to share under the statute of distributions. He might, at common law, take by *descent*, to the exclusion of the next heir; and according to Lord

Coke, the estate was allowed to vest in such heir until his birth. (*Plowd.* 375. 3 *Co.* 61. *Hob.* 222. *Dyer*, 106.) In pursuance of the same doctrine, he might be vouched to warranty, and an action for detainment of chattels might be brought for him *as heir*. In a modern case also (5 *Term R.* 59, 60), the marriage of a testator subsequent to his will, and the birth of a posthumous child, was resolved to be a revocation of the will, and such child was allowed to take as heir." (*Ib.* 24.)

It has also been held by the court of chancery in the State of New York, that an unborn child, after conception, is to be considered *in esse*, for the purpose of enabling it to take an estate, or for any other purpose which is for the benefit of the child if it should afterward be born alive; or, in the language of one case, "a child in *ventre sa mere*, at the death of the testator, is considered *in esse*; and if it should afterward be born alive, it would be equally entitled with those children who were born in the life-time of the testator." (*Jenkins v. Freyer*, 4 *Paige's R.* 47.) Or, in the language of another and still later case, "an unborn child, after conception, if it is subsequently born alive, and so far advanced toward maturity as to be capable of living, is considered as *in esse* from the time of conception, when it is for the benefit of the child that it should be so considered." (*Howe v. Van Schaick*, 3 *Barb. Ch. R.* 488.)

It seems, however, that infants unborn are not seised of real estate, and hence courts cannot sell their interests, because such interests do not exist: they can sell only interests existing. But if a child should be born, it will be vested with the interest in the share substituted for real estate, and held by its co-heirs. (*Bowman v. Kelman*, 27 *How. Pr. R.* 212, 213.)

It seems also that, under the statutes of New York, an actual partition or sale under a judgment in partition, is effectual to bar the future contingent interests of persons not *in esse*, though no notice is published to bring in unknown parties, and though such future owners may take as purchasers under a deed or will, and not as claimants under any of the parties to the action. And it seems that, independent of the statute, contingent remaindermen, or persons to take under an executory devise, who may hereafter come into being, are bound by the judgment as being virtually represented by the parties to the action in whom the present estate is vested. (*Mead v. Mitchell*, 17 *N. Y. R.* 210.)

§ 158. The question when an unborn child is to be considered as *in esse* is well settled by the American decisions to be in accordance with the civil law upon the same subject. As it respects third persons, or the rights of others claiming through the infant in *ventre sa mere*, if the child is born dead, or in such an early stage of pregnancy as to be incapable of living, it is to be considered as if it never had been born or conceived. When the mother dies before the birth of the child, and the latter is delivered by the cæsarean operation, it is considered in existence before its birth, for its own benefit to take the estate of the mother by descent, but not for the benefit of the father to enable him to hold as tenant by the curtesy. And children born within the first six months after conception are presumed to be incapable of living, and therefore cannot take and transmit property by descent unless they actually survive long enough to rebut that presumption. A party who claims property through the child is bound to establish the fact that it was born alive; and if the child never breathed there is no legal presumption in favor of the fact. (*Marsellis v. Thalhimer*, 2 *Paige's R.* 35.) In this regard the courts of this country adopt the rule which prevails in Great Britain.

In England there are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife. And in this connection Blackstone says: "The issue must be born alive. Some have had a notion that it must be heard to cry; but this is a mistake. Crying indeed is the *strongest* evidence of its being born alive, but it is not the *only* evidence. The issue also must be born during the life of the mother; for if the mother dies in labor and the cæsarean operation is performed, the husband in this case shall not be tenant by the curtesy, because at the instant of the mother's death he was not clearly entitled, as having had no issue born, but the land descended to the child while he was yet in his mother's womb, and the estate being once so vested shall not afterward be taken from him." (2 *Black. Com.* 128.) This is asserted upon the authority of a very early case. One Reppes, of Northumberland, took to wife an inheritrix, who was great with child by him, and died in her travail, and the issue was ripped out of her belly alive; and by reference out of the chancery to the justice they resolved that he should not be tenant by the curtesy, for it ought to begin by the birth of the issue, and be consummated by the death of the wife." (*Payne's case*, 8

Coke's R. 34.) But as regards the rights of the child personally, it is sufficient that it is born alive, and so far advanced to maturity as to be capable of living.

§ 159. The rights of a post-testamentary child, or of a child born to a testator after the publication of his will, depend generally upon statutory provision. Thus, in the State of New York, it is provided that whenever a testator shall have a child born after the making of his will, either in his life-time or after his death, and shall die, leaving such child, so after born, unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, every such child shall succeed to the same portion of the father's real and personal estate as would have descended or been distributed to such child if the father had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will. (2 *R. S.* part 2, *ch.* 6, *tit.* 1, § 49. 2 *Stat. at Large*, 65.) Under this provision of the statute, it is held that all the devisees and legatees must contribute ratably, in proportion to the value of the real and personal estate devised or bequeathed to them respectively, to make up the distributive share of the post-testamentary child; and that in making such contribution, no distinction is to be made between specific, general and residuary legatees; but each legacy is to abate ratably, in proportion to its amount or value. And further, that even a legacy given to the widow of the testator in lieu of dower, must be taken into the account in estimating the amount which the other legatees are bound to contribute to make up the share of a post-testamentary child in the estate of the father. But, as between the widow and such child, the latter cannot take a child's portion of the real estate discharged of the widow's right of dower, and also a ratable proportion of a legacy given by the testator to the widow in lieu of such dower. (*Mitchell v. Blair*, 5 *Paige's R.* 588.)

§ 160. A bastard is a child conceived and born out of lawful wedlock, or a person born without lawful parentage. The question is sometimes settled by express enactment, and the laws of different countries are not uniform on the subject.

By the English laws, a bastard is one that is not only begotten, but born out of lawful matrimony. The law is not so strict as to require the child to be in all cases *begotten*, but it is an indispensable condition to make it legitimate, that it be *born* after lawful

wedlock. (*Black. Com.* 454, 455.) The civil and canon laws differ from the English law, in that they do not allow a child to remain a bastard, if the parents afterward intermarry (*Inst.* 1, 10; *B. Decot*, l. 4 t. 17 c. 1). And this is the rule in France, Holland and Germany.

By the statutes of New York, a child is deemed a bastard who is begotten and born out of lawful matrimony; or while the husband of its mother continued absent out of the state, for one whole year previous to the birth of the child, separate from its mother, and leaving her during that time continuing and residing in the state; or during the separation of its mother from her husband, pursuant to a decree of any court of competent authority. (1 *R. S.* part 1, ch. 20, tit. 6, § 1. 1 *Stat. at Large*, 595.)

In some others of the American States, as in Pennsylvania, Virginia and North Carolina, a child born during marriage may be proved to be a bastard—first, by evidence of the husband's inability; second, by proof of the non-access of the husband to his wife; third, by proof that the child was born out of due time; or, fourth, by proof that the child was born during the wife's open cohabitation with another man, and such child was considered illegitimate by the family. (*Commonwealth v. Stricker*, 1 *Browne's [Pa.] R.* app. 47. *Commonwealth v. Wentz*, 1 *Ashm. [Pa.] R.* 269. *State v. Pellaway*, 3 *Hawks' [N. C.] R.* 623. *Bowles v. Bingham*, 2 *Munf. R.* 442. 3 *ib.* 589.)

As a general thing, it would seem that the law recognizes a child as legitimate begotten *before* but born *after* marriage, on the ground that a man marrying a woman in an advanced stage of pregnancy thereby admits the child afterward born to be his own, and in some states this is conclusive upon the question of legitimacy, while in others it is not. But in no case is it regarded as conclusive that a child *begotten* in lawful wedlock is legitimate. The presumption of law is in favor of legitimacy in such cases, but as a general rule, such presumption may be rebutted by evidence. (*Morris v. Davies*, 14 *Eng. C. L. R.* 534. *Regina v. Mansfield*, 41 *ib.* 618. *Stegall v. Stegall*, 2 *Brook. [U. S.] R.* 256.)

In the State of Vermont, it is provided by statute, that when the parents of an illegitimate child shall intermarry after the birth of such child, it shall, if recognized by the father as his child, be considered legitimate, and be capable of inheriting. (*R. S.* 1863, ch. 56. § 5.)

In the State of Indiana, the statute declares that if a man shall marry the mother of an illegitimate child, and acknowledge it as his own, the child shall be deemed legitimate. (1 R. S. 1862, ch 46, § 9.)

And in the State of Pennsylvania, it is provided that in any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock and cohabit, such child or children shall thereby become legitimate, and enjoy all the rights and privileges, as if they had been born during the wedlock of their parents. (*Laws of 1857, p. 507. Laws of 1858, p. 413. Purdon's Dig. 699.*) It is probable that similar provisions are contained in the statutes of other states.

§ 161. The birth of a child after the death of the husband, if within a possible period of gestation commencing from a time anterior to such decease, is held to be legitimate, unless there are circumstances to forbid it; and this period has been extended in some instances to an extravagant extent. But now, by the common consent of mankind, the time of gestation is considered to be ten lunar months, or forty weeks, equal to nine calendar months and a week. This period has been adopted because general observation has proved its correctness, though it is not denied that differences of one or two weeks have occurred. Dr. William Hunter, a distinguished Scottish surgeon and accoucheur of the last century, in answer to a question put to him on this subject, replied, that "the usual period is nine calendar months, thirty-nine weeks; but there is very commonly a difference of one, two or three weeks." (1 *Beck's Medical Jurisprudence*, 449, 450.)

It is evident that this period of gestation cannot be accurately settled, so as to establish an arbitrary rule for every individual case, on account of the uncertainty which attaches to the different circumstances, which must be taken into the account in the reckoning of almost every case. The circumstances are: first, certain peculiar sensations experienced by some females at the time of conception, or within a few hours or a day, or two or more days, after the fruitful coitus; second, the cessation of the catamenia; third, the period of quickening; fourth, a single coitus. Upon reviewing these circumstances, it is found that a degree of uncertainty attaches to them all. Some females are never conscious of the first circumstance mentioned, and the last is seldom applicable to a married female; while the period of quickening is sufficiently

varying to render it perfectly nugatory in the calculation. The cessation of the catamenia, is the point from which most females date the period of conception; but the great variety that exist as to the return of the period of menstruation in different females, and other things which may be connected with the matter, render this circumstance very liable to doubt and to mistake. (1 *Beck's Medical Jurisprudence*, 450, 451.) But as the law must have some criterion by which to judge in these cases, the term of gestation is fixed at ten lunar months, or forty weeks.

To avoid any question which might arise in cases of second marriage by the widow soon after the death of the husband, it was a rule of the civil law that she should be prohibited from marrying *infra annum luctus*, within the year of mourning, which, according to the ancient Roman calendar, was ten months, and it is said that the same rule was adopted by the Saxons and Danes, except that the year was twelve months; but no such practice prevails at the present, either in this country or in England.

§ 162. The legal incidents of illegitimacy relate principally to succession or inheritance, and as these have no peculiar connection with the subject of infancy, it is not necessary to pursue the question here. It may be said in passing, however, that a bastard is held to be *nullius filius*, and independent of express statute provision, he cannot take real or personal estate as the heir of either parent, nor has he even the name of the father or mother, but may assume it or any other name, and is known in law only by his assumed or reputed name. But there are a few features which distinguish the bastard infant from legitimate infants, which it is proper to notice. Thus, the guardian in *socage*, in the case of a bastard *aigne* and *mulier puisne*, may enter in behalf of the *mulier*, and such entry is good to prevent a descent. (*Co. Litt.* 245 a.)

Where the law requires the consent of parents or guardians to the marriage of an infant, in the case of an illegitimate infant, he is allowed to nominate a guardian in court, and the court appoints the nominee; and the practice of choosing guardians in court is unknown in modern times, except in these cases. (*McPherson on Inf.* 78.)

A putative father will not be appointed guardian of his illegitimate child, having no property, unless he makes settlement upon him; and he has no absolute right, under any circumstances, to claim the guardianship. (*McP. on Inf.* 110.)

Neither father nor mother, nor both, nor any one except a guardian appointed by the court, can consent to the marriage of an illegitimate minor; and under Lord Hardwicke's act in England, marriages of such persons with the concurrence of their parents were frequently annulled on this ground, though now consent is dispensed with by the English statute, where there is no person having authority to give it, and the license for the marriage of the minor may be granted upon oath made that there is no person who can consent. (*McP. on Inf.* 179.) Illegitimate children are not considered as relations, nor are they favored in law, and as such merely they never come within the rule which governs in case of heirs. (*Perry v. Whitehead*, 6 *Ves. R.* 547. *Lowndes v. Lowndes*, 15 *ib.* 301.)

A bastard in *ventre sa mere* cannot take under a bequest to all the natural children of a certain specified person, for the reason that a bastard's reputation begins with its birth. (*Melton v. Duke of Devonshire*, 1 *P. Wms. R.* 529.) A bastard, says Lord Coke, cannot take but after he hath gained a name by reputation; he can have no remainder limited before he be born. (*Co. Litt.* 3, 6.) But Sir W. Grant thought that if a legacy was given to a natural child, of which a particular woman was *enciente*, without reference to any person as the father, there would be no uncertainty in the bequest, and it would probably be held valid. (*Earle v. Wilson*, 17 *Ves. R.* 528, 532.) And in a subsequent case, where a testator had given an annuity for the education of the child of which a certain specified female was then pregnant, Lord Eldon decided that the bequest was good; and that it was possible to hold, consistently with the doctrine of Lord Coke, that if an illegitimate child in *ventre sa mere* was described so as to ascertain the objects intended to be pointed out, it might take under that description. (*Gordon v. Gordon*, 1 *Meriv. R.* 141.)

The rights of an illegitimate child, with respect to inheriting property, and the distribution of his own property, in case of intestacy, are generally declared by statute, and there is but very little that is peculiar to such a child while an infant. Enough, therefore, perhaps, has been said upon this branch of the subject.

CHAPTER XV.

GUARDIANSHIP OF INFANTS — DIFFERENT KINDS OF GUARDIANS — GUARDIANS, HOW CONSTITUTED OR APPOINTED — POWERS AND DUTIES OF GUARDIANS — REMEDIES AGAINST GUARDIANS — JURISDICTION OF COURTS OVER GUARDIANS — ACCOUNTS BY GUARDIANS, AND THEIR COMPENSATION.

§ 163. A GUARDIAN is a person who by law has the custody of the person and estate of an infant, and the person who is under the care of a guardian is called a ward. The guardian in this country and in England, performs the office both of the *tutor* and *curator* of the Roman laws, the former of which had the charge of the maintenance and education of the minor, and the latter the care of his fortune. The office was frequently united in the civil law, as it always is in our law with respect to minors.

The relation of guardian and ward bears a very near resemblance to that of parent and child, the guardian being a temporary parent, continuing the relation during the minority of the child.

There are two kinds of guardianship; one by the common law, and the other by statute. (2 *Kent's Com.* 218.)

Guardianship at common law has fallen into comparative disuse in this country; although many of the principles which entered into that relation, are adopted in guardianship by statute. It is well, therefore, to consider briefly the different kinds of guardians known to the common law, as well as those recognized by statute. There were four kinds of guardians at common law, viz.: guardian in chivalry, guardian in socage, guardian by nature, and guardian by nurture.

§ 164. Guardianship in chivalry arose out of the feudal practice of bestowing land in consideration of military service, and took place only when lands came to an infant by descent, which were held by knight service. It was natural that when military service was suspended on account of the infancy of the tenant, the lord should resume the fee which had originally moved from himself, until the heir male became capable of wearing heavy armor and doing knight service, or the heir female of having a husband who could perform the service for her. The infant, on the other hand, whose inheritance the lord enjoyed, had an obvious claim upon him for education and protection, and he was interested in training up his male vassals to arms, and in preventing his female

tenants from marrying his enemies. A system of guardianship based upon these principles, existed among the Normans, and was introduced into England after the conquest. (*Coke's Copyholder*, § 22. *McPherson on Inf.* 2.)

When, upon the death of one holding by knight's service of a single lord, his or her land descended to an unmarried male heir under the age of twenty-one, the lord was entitled to the custody of the heir's person, and also of the land, until he arrived at the age of twenty-one, when the law supposed him to be fit for the services of chivalry.

The guardian might present to churches, bar the marriage of women, and take to his own use all other profits and incidents which belonged to the minor and his estates, but could make no alienation of the inheritance. He was obliged to maintain the infant, and was expected to see that he was "in his young years taught the deeds of chivalry and other virtuous and worthy sciences." Moreover, as he had all the emoluments of the heir, he was to act in all the concerns of the latter, and to prosecute all suits for the recovery of his rights. Finally, it was his duty to restore the inheritance in good condition, and also freed from the debts of the ancestor, in proportion to the duration of the custody and the value of the estate. (*McPherson on Inf.* 2, 3, and *authorities cited.*)

The lord's interest in controlling the marriage of his female wards led to his exacting a price for his consent, and at length it became customary to sell the marriage of wards of both sexes. (2 *Black. Com.* 70.)

If the king conferred knighthood upon an infant ward in chivalry, which might be as soon as he was baptized, this amounted to a judgment that he was able to do knight's service, and his body was immediately out of ward, but his land remained in ward till he reached twenty-one. (*Sir Drue Drurie's case*, 6 *Coke's R.* 74.)

When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or ouster-lemain, that is the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land, though Blackstone says this was expressly contrary to *magna charta*. (2 *Black. Com.* 68.)

When the heir thus came of full age, provided he held a knight's fee *in capita* under the crown, he was to receive the order of knighthood, and might be compelled to take it upon him, or else

pay a fine to the king. For in those heroical times no person was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. (2 *Black. Com.* 69.)

Guardianship in chivalry might be forfeited by disparagement, waste, alienation, outlawry or attainder. There were various and peculiar qualities, fruits and consequences of tenure by knight's service, and many interesting incidents connected with this species of guardianship; but as the military part of the feudal constitution of England has been done away by statute, and as guardianship in chivalry was never known in the United States, nothing further need be said upon the subject.

§ 165. Guardianship in socage arises only when the infant has land by descent, and is very different from guardianship as an incident to knight service. (*Quadring v. Downs*, 2 *Mod. R.* 176.) It takes place when socage lands descend to the infant while under fourteen years of age, and ceases when the infant arrives at the age of fourteen years, unless no other guardian is appointed for him. The age of the tenant was originally fixed at fifteen, with reference to his fitness for agricultural employment, but fourteen has for many centuries been regarded as his full age. (*McPherson on Inf.* 19.) The guardian in socage is only appointed in the case of a legal estate, for otherwise difficulty might arise with respect to the obligations incident to the tenure. (*Vide Rex v. Toddington*, 1 *Barnwell & Alderson's R.* 560.)

The guardian in socage is guardian of the person of the ward as well as of his estate, and he cannot assign his guardianship. The guardian must be a person to whom the inheritance by no possibility can descend; as, when the estate descended from the father, in this case his uncle by the mother's side cannot possibly inherit the estate, and therefore he would be the guardian. For the law recognized in such cases judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him, that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust. (1 *Black. Com.* 461.)

Lord Chancellor Macclesfield vehemently condemned the rule that the next of kin, to whom the land cannot descend, is to be the guardian in socage, and declared that "it is not grounded upon reason, but prevailed in barbarous times, before the nation was civilized." (*Dormer's case*, 2 *P. Wms. R.* 262.)

If the infant has lands by descent both *ex parte paterna* and *ex parte materna*, then the next of kin on each side will respectively be guardians by socage of these lands; and of these two claimants, the first occupant will retain the custody of the infant's person. (1 *Black. Com.* 462, note 6.)

At the age of fourteen, the ward may oust the guardian and call him to account for the rents and profits of the estate, for at that age the law supposes him capable of choosing a guardian for himself.

Marriage, or the *valor maritagii*, was never in socage tenure any perquisite or advantage to the guardian, but rather the reverse. In this, and in many other respects, the socage tenures had much the advantage over the military ones.

If the guardian in socage dies before the ward has completed his fourteenth year, the wardship does not go to the executors, like wardship in chivalry, because it only exists for the benefit of the heir; but it devolves upon the next friend to whom the inheritance cannot descend. And the same is the rule when the guardian becomes incapable. (*McPherson on Inf.* 25.) The guardian in socage must take possession of the person of the heir, and of the lands and tenements which he had by descent, to keep the rents and profits for the heir until the latter reaches the age of fourteen, to keep his evidence of title safely, and to bring him up well.

Guardianship in socage is a trust reposed in the next friend by the law, and it has been said that the office cannot be refused.

The guardian in socage has an actual estate and interest in the land, though not to his own use. He has a right, therefore, to elect whether he will let the estate or occupy it for the benefit of the ward; and unless he lets it, the law which imposes the duty of a guardian upon him, will necessarily protect him in the personal occupation and superintendence of it. The law considers a guardian in socage as entitled to the possession of the ward's property, and incapable of being removed from it by any person. (*McPherson on Inf.* 28.) He may in his own name bring trespass or ejectment, distrain for damage-feasant, or make a lease for years, until the heir attains the age of fourteen; and he may avow in his own name and right for rent upon a lease. (*McP. on Inf.* 35.)

It is laid down that a guardian in socage can make partition, and that this will bind the infant if it be equal; and, also, that if a tenant in socage mortgages his land, the guardian in socage of the

heir may tender the mortgage money in the ward's name, even without his consent. He may justify the occupation and governance of the land and likewise of the body, against the heir himself. (*McP. on Inf.* 37.)

The guardian must be charged upon his account as *guardian* and not as receiver, and is entitled to an allowance of his reasonable costs and expenses in all things. If he receives the rents and profit of the land, and is robbed of them without his own default or negligence, he will be discharged of them upon his account, and not be required to sustain the loss personally.

When a woman, guardian in socage, marries, the account lies against her and her husband for the profits taken before the coverture, and against the husband alone for those taken during coverture. (*McP. on Inf.* 39, and *authorities cited.*)

Neither an infant, an idiot, or a deaf-mute, can be guardian in socage. But if an individual be guardian in socage of an infant under fourteen years, the rule is that he must be guardian in socage of another infant of whom the first infant ought to be guardian. (*Co. Litt.* 88 b.)

There are many other suggestions which might be made with respect to guardianship in socage, but perhaps enough has been said, from the fact that this species of guardianship has become nearly or quite obsolete in this country, and therefore no particular interest is felt in the subject. This description of guardianship was never very common in the United States, and in those states where it was ever adopted it has now fallen into disuse. It is difficult to conceive how this species of guardianship can exist in this country, for the reason that none can be guardian except the next of kin, who cannot possibly inherit the estate, and such an instance can hardly occur under the laws of inheritance prevailing in the United States. (2 *Kent's Com.* 223. *Vide also Combs v. Jackson*, 2 *Wend. R.* 153.) In some instances, however, the rights, forms and duties of a guardian in socage, are conferred and imposed upon a species of guardian created by statute. (*Vide Fonda v. Van Horne*, 15 *Wend. R.* 631.)

§ 166. Guardianship by nature extends only to the person, and the subject of it only the heir apparent, and not the other children. Under the old law, a guardian by nature was entitled to the custody of his ward's person, up to the age of twenty-one, and could sell the marriage of his ward for his own benefit; but he

could not assign the *custody and marriage*, that is the right of marrying the ward, for this right was inseparable from the person of the guardian; nor could he, like the lord in chivalry, compel the ward to marry by exacting penalties for refusal. The wardship, therefore, was not a chattel in the guardian, and it was not forfeited by his outlawry, nor transmissible to his executors. (*Vide Englefield's case*, 7 *Coke's R.* 13 b. *Calvin's case*, Bro. Garde, 6.) The guardian by nature is the father, and in case of the decease of the father, then the mother, and on her death the next of kin. (*Co. Litt.* 88. *Jackson v. Combs*, 7 *Cow. R.* 36. *Combs v. Jackson*, 2 *Wend. R.* 153. *Eldridge v. Lippincott*, Cox's [*N. J.*] *R.* 397. *Field v. Law*, 2 *Root's R.* 320. *May v. Calder*, 2 *Mass. R.* 55. *Futo v. Brown*, 4 *Mass R.* 675. *Smith v. Williamson*, 1 *Harr. & Johns. [Md.] R.* 147. *Corrie's case*, 2 *Bland's Ch. R.* 488.) The mother of an illegitimate child is its natural guardian. (*People v. Landt*, 2 *Johns. R.* 375. *Somerset v. Dighton*, 12 *Mass. R.* 383. *Wright v. Wright*, 2 *ib.* 109. *Dalton v. State*, 6 *Black. [Ind.] R.* 357. *Ex parte Knee*, 4 *Bos. & Pul. R.* 149.)

Guardianship by nature is quite different from the parental power. The first is instituted in favor of the infant, and is regarded as a burden, while the latter is a right, and is in favor of the father and mother. A guardian by nature has no control over the real or personal estate of his infant children. (*Combs v. Jackson*, *supra*. *Hyde v. Stone*, 7 *Wend. R.* 354. *Fonda v. Van Horne*, 15 *ib.* 631. *Gerret v. Talmadge*, 1 *Johns. Ch. R.* 3. *Ib.* 561. *Kline v. Beebe*, 6 *Conn. R.* 444. *Miles v. Kaigler*, 10 *Yerg. [Tenn.] R.* 10.) In a case in the supreme court of the State of New York, it was held, that if a father, during the infancy of his child, sells chattel property belonging to the child, with the assent of the child, and for the purpose of having it replaced by other property, and the father purchases other property and gives it to the child, but it remains in the possession of the father; as between the child and the creditors of the father, such substituted property does not become the property of the child, and is the property of the father, and subject to a levy under an execution against him. (*Fonda v. Van Horne*, *supra*.) This shows how rigidly the rule is adhered to, that a guardian by nature has no control over the property, real or personal, of the child. Neither has such guardian any right, as guardian by nature, to receive the rents and profits of the infant's lands. (*Jackson v. Combs*, *supra*. *Combs v. Jackson*, *supra*.) Nor

has he power to lease the lands of the infant, nor to receive a legacy due him. (*May v. Calder*, 2 *Mass. R.* 55. *Miles v. Boyden*, 3 *Pick. R.* 213. *Gerret v. Talmadge*, *supra*. *Anderson v. Darby*, 1 *Nott. & McCord's [S. C.] R.* 369. *Ross v. Cobb*, 9 *Yerg. R.* 463. *Dayley v. Talferry*, 1 *P. Wms. R.* 285.)

The power of the guardian over the person of the child ceases at twenty-one, and in some of the states at eighteen over females; and chancery will deprive him of his authority at any time, if his character render him unsuitable. (*Willesby v. Willesby*, 1 *Dow. N. S.* 152. 2 *Bligh, N. S.* 124. *Willesby v. Duke of Beaufort*, 2 *Russ. R.* 1, 20, 21.)

It has been held that fixed habits of intemperance furnish sufficient cause for the removal of a guardian by nature. Such a person is himself a proper subject of guardianship, and of course is not fit to have the control of the persons of others. (*Vide Keteltas v. Gardner*, 1 *Paige's R.* 488. *Cowles v. Cowles*, 3 *Gilm. R.* 435. *DeMannville v. DeMannville*, 10 *Ves. Jr.* 52. *Whitfield v. Hales*, 12 *ib.* 492. *Ex parte Mountford*, 15 *ib.* 445. 2 *Story Eq. Jur.* § 341. *Duke of Beaufort v. Berty*, 1 *P. Wms. R.* 703. *Shelly v. Westbrook*, *Jacob's R.* 266. *Lyons v. Blenkin*, *Ib.* 245. *Roach v. Gowan*, 1 *Dick. R.* 88. *Lord Shipbrook v. Lord Hinchinbrook*, 2 *ib.* 547. *Crenze v. Hunter*, 2 *Cox's R.* 242. *Ball v. Ball*, 2 *Simons' R.* 35.)

In regard to this interference of the court with ordinary rights of parents, as guardians by nature of their children, Judge Story says: "Although in general parents are intrusted with the custody of the persons and the education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion, and that they will be treated with kindness and affection. But whenever this presumption is removed; whenever (for example) it is found that a father is guilty of gross ill treatment or cruelty toward his infant children, or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery, or that he possesses atheistical or irreligious principles, or that his domestic associations are such as tend to the corruption and contamination of his children, or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the court of chancery will interfere and deprive him of the custody of his children, and appoint a suitable person

to act as guardian, and to take care of them, and to superintend their education." (2 *Story Eq. Jur.* § 1341.)

Mr. McPherson, in his excellent treatise, gives an account of the ancient technical office of guardian by nature, and states certain reasons for thinking that the office ceased to exist when values of marriage were abolished by the English statute; and, after referring to numerous cases, says: "It seems plain, therefore, upon the authorities, that the guardianship by nature, of which a description has been given, was an office of a technical and arbitrary character, derived entirely from the interest of the ancestor in disposing of his heir in marriage, and, as appears from its lasting till twenty-one (when other guardians determined at fourteen), closely connected with tenure by knight's service. It might have been expected that this office would have ceased to exist when all 'values and forfeitures of marriage by reason of any tenure of the king's majesty, or of any other by knight's service,' were taken away, and when the practice of selling children in marriage fell into general disuse. As to collateral relations, this seems to be admitted; but a question may, perhaps, be raised in behalf of the father, though it seems difficult to distinguish the cases on principle." (*McPherson on Inf.* 58.)

On the contrary, Mr. Hargrave, an author much quoted, considers this guardianship by nature to be still in full force, and strictly confines it to the heir apparent; and he says that in modern books: "When guardianship by nature is extended to children in general, or to any besides such as are heirs apparent, it is not conformable to the legal sense of the term amongst us, but must be understood to have reference to some rule independent of the common law. Thus, when in chancery the father and mother are styled the natural guardians of all their children born in marriage, or of any of their illegitimate issue, we should suppose those who express themselves so, generally to refer to that sort of guardianship which the order and course of nature, so far as we are able to collect it by the light of reason, seem to point out; and to mean that it is a good rule to regulate the guardianship by, when positive law is silent; and it is in the discretion of the lord chancellor to settle the guardianship." (*Hargrave's note 12 to Co. Litt.* 88 b.) And this species of guardianship is fully recognized as existing at the present day by the American courts; although, under the operation of our laws making all the children equally

heirs, the guardianship by nature would seem to extend to all the children, and not to be confined, as at common law, to the heir apparent or oldest son. (*Willard on Executors*, 444.)

§ 167. Guardianship by nurture occurs only when the infant has no other guardian, and belongs exclusively to the parents; first to the father, and then to the mother. This species of guardianship is also confined to the government and education of the infant, and is determined, in both males and females, at the age of fourteen years. (*Bing. on Inf.* 159.)

The guardian may deliver the infant to another person for instruction, and may take him back whenever he pleases. If he grants over the custody of the infant, the grant is binding upon the guardian, though the infant may choose whether he will stay with the person to whom he has been granted, or not. If the guardian discharges the infant out of his house, and the latter binds himself apprentice, the guardian cannot retake him. (*McP. on Inf.* 60.)

The guardian has nothing to do with the property of the infant. In all dealings with the infant's property, the guardian for nurture is very much on the same footing as a stranger. (*Bac. Abr. tit. Guardian, G. Ross v. Cobb*, 9 *Yerg.* [*Tenn.*] *R.* 463.)

If a father, guardian for nurture, occupies the lands of his son, he is regarded as a tenant at will. A guardian by nurture can only make a lease at will of the infant's land. If he makes a lease by indenture to one being in under the title of the infant, rendering rent to himself, which is paid accordingly, this is not a disseisin to the infant. (*McPherson on Inf.* 60.) The subjects of this species of guardianship, at common law, are the younger children, who are not heirs apparent. It is manifest, therefore, that there can be no room for guardianship by nurture in this country, because, by our laws of inheritance, all the children are heirs; so it may be said that this species of guardianship here has become obsolete.

§ 168. With respect to the guardianship of the father, it may be safely asserted that there is a right inherent in the parent, recognized by positive law, and in no degree dependent on the discretion of chancellors or judges, to act as guardian of all his children, not only during the time of guardianship for nurture, but till the age of twenty-one.

In one case, the Lord Chancellor of England said that "the father is entitled to the custody of his own children during their

infancy, not only as guardian by nurture, but by nature." (*Ex parte Hopkins*, 3 P. Wms. R. 480.) And, in another case, Lord Hardwicke calls the father "the natural guardian of the sons during their minority." (*Stileman v. Ashdorn*, 2 Atk. R. 480.) And, in still another case, Lord Eldon says that "the law makes the father the guardian of his children by nature and by nurture;" and, in the same case, Lord Redesdale said that "the father is intrusted with the care of his children, because it is supposed that he would best execute the trust." (*Wellsley v. The Duke of Beaufort*, 2 Russ. R. 21.) In the case of an infant of the age of eighteen, Lord Eldon says that "a guardian cannot be appointed during the father's life, although, in certain cases, a person may be nominated to act as guardian; nor does the court of chancery ever take upon it to appoint the father guardian." (*Ex parte Mountfort*, 15 Vesey's R. 447.)

Blackstone says that when "a fatherless child has no other guardian, the court of chancery has a right to appoint one." (3 *Black. Com.* 427.) And, again, he says, that the father, and in some cases the mother, is the guardian by nature of the child, "for if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits." (*Ib.* 461.) He says, again, that "there are also guardians for nurture, which are, of course, the father or mother, till the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education." (*Ib.*) The intimation, however, that the father, as guardian by nature, has any control by law over the estate of his infant child, must be taken with qualifications. (*Vide ante*, § 166.) Blackstone elsewhere says, that the power of a parent over the child is sufficient to keep him in order and obedience. "He may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education." (1 *Black. Com.* 452.) And again, "the legal power of a father—for a mother, *as such*, is entitled to no power, but only to reverence and respect—the power of a father, I say, over the persons of his children ceases at the age of twenty-one, for they are then enfranchised by arriving at years of discretion, or that point which the law has established, as some must necessarily be established, when the empire of the father or other guardian gives place to the empire of reason. Yet, till

that age arrives, this empire of the father continues even after his death, for he may by his will appoint a guardian for his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed." (*Ib.* 153.) In regard to this delegated power, however, it should be stated, that it must be temperately exercised, and no schoolmaster should feel himself at liberty to administer chastisement co-extensively with the parent, howsoever the infant delinquent may appear to deserve it.

Concerning property, Judge Blackstone says: "A father has no other power over his son's *estate* than as his trustee or guardian, for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefits of his children's labor while they live with him, and are maintained by him; but this is no more than he is entitled to from his apprentices or servants." (1 *Black. Com.* 453.) So much for the different kinds of guardians at common law, some of which have become obsolete, and others have been superseded by guardians created by statute.

§ 169. Guardians by statute are those which are created by statute, or recognized by legislative enactment. There are of this species of guardianship, four kinds: guardians testamentary or by deed, guardians appointed by the courts, guardians *ad litem*, and special guardians. These statutory guardians are really at present, the only ones practically known in this country, although they contain many of the principles which determined the rights and duties of guardians at common law; and in some of the states guardianship in socage is, in some respects recognized by statute. Thus, in the State of New York, when an estate in land becomes vested in an infant, the guardianship of such infant, with the rights, powers and duties of a guardian in socage, belongs by statute, to the father of the infant; and if there be no father, to the mother; and if there be neither father nor mother, then to the nearest and eldest relative of full age, not being under any legal incapacity; and, as between relations of the same degree of consanguinity, males are preferred. To this guardian, all statutory provisions that are or may be in force relative to guardians in socage, are deemed

to apply, though the rights and authority of every such guardian are superseded, in all cases where a testamentary or other guardian has been duly appointed. (1 *R. S. part 2, ch. 1, tit. 1, art. 1, §§ 5-7. 1 Stat. at Large, 666, 667.*) Except for the provisions of this statute, a father could not be guardian in socage to his child, for the reason that by the laws of descent recognized in the United States, and especially in New York, the inheritance of the child may descend to the father, which by the common law, guardian in socage is forbidden to any one to whom the inheritance may by any possibility descend. (*Vide Fonda v. Van Horne, 15 Wend. R. 631; and ante, § 165.*) Under the statute, it is held, that when the owner of land dies, leaving a widow and infant heirs, the widow becomes vested with the powers of a guardian in socage, and as such is authorized and required to take the rents and profits of the land for the benefit of the heirs; and the legal intendment seems to be, that from the time of her husband's death, she occupies the land as guardian in socage. (*Sylvester v. Ralston, 31 Barb. R. 286.*) Notwithstanding, guardianship at common law has fallen into comparative disuse in this country, many principles pertinent to it are incorporated into guardianships by statute, or those created by judicial or testamentary appointment.

§ 170. A testamentary guardian is one appointed by the last will and testament of the father, and, in some states, of the mother, of the child. In regard to this species of guardianship, it is generally understood that it could never exist except it was provided for by statute, although there is some reason to think, that when there was no other guardian marked out by law, testamentary dispositions of the guardianship of children were not unknown, even before the enactment of any statute upon the subject. Lord Coke, speaking of a sort of guardianship, analogous to guardianship in socage, and arising where an infant succeeds to inheritances not lying in tenure, says that such guardianship takes place only "if the father hath made no disposition of the custody of the child." (*Co. Litt. 87 b.*) And in another place he speaks of a guardian appointed by the spiritual court, "where a man deviseth goods unto his child, and appointeth him not guardian." (*Co. Cop. § 23; and vide Anonymous, 3 Salk. R. 176.*) On the contrary, Lord Alvernley, in a modern case, said: "The question will in a great measure depend upon the determinations as to wills of land. It is clear by the common law, a man could not by any testamentary disposi-

tion, affect either his land or the guardianship of his children. The latter appears never to have been made the subject of testamentary disposition till the statute 12 Charles II. It is impossible to contend that it was comprehended under the statute 32 Henry VIII. Till that time, as to land, and as to guardianship, till the later statute of Charles II, the law pointed out the person to succeed; and it was incompetent to the party, by any testamentary act, to alter the succession of the person to inherit the real estate, or whom the law pointed out as guardian, whether the party died intestate or not." (*Ex parte Ilchester*, 7 Ves. R. 370.) This would seem to be a correct statement of the law, and it is so understood at the present day, both in England and in this country.

The first statute which authorized the appointment of a guardian by will, was passed about two centuries ago in England, and the provisions of this statute have been generally adopted in this country, with the exception perhaps of some of the New England States, and the same powers are given to the guardian that he possesses under the English statute.

It was provided by the statute referred to, "that where any person hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child or children, whether born at the time of the decease of the father, or at that time in *ventre sa mere*, or whether such father be within the age of twenty-one years, or of full age, by his deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder, other than Papist recusants; and such disposition of the custody of such child or children, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in socage or otherwise. And such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, and also the custody, tuition and management of the goods, chattels, and personal estate of such child or children, till their respective age of one and twenty years, or any lesser time,

according to such disposition as aforesaid; and may bring such action or actions in relation thereto, as by law a guardian in common socage might do." (12 *Car. 2, ch. 24.*)

The statute laws of this country, which have adopted or followed the provisions of the English statute, have generally abridged its explanatory and verbose phraseology, but it is not presumed that the several legislatures intended to vary the construction of it. (*Vide 2 Kent's Com. 225.*)

It will be observed that by the English statute the right to appoint a testamentary guardian is given absolutely to the father, but by the statutes of several of the American States, such right cannot be exercised except the mother, if living, assent thereto. Thus, in the State of New York, it is expressly provided, that "no man shall bind his child to apprenticeship or service, or part with the control of such child, or create any testamentary guardian therefor, unless the mother, if living, shall in writing signify her assent thereto." (*Laws of 1862, ch. 172, § 6.*) Guardianship by will or deed supersedes all the other guardianships heretofore mentioned.

§ 170. The powers of a testamentary guardian depend entirely upon the particular terms of the will from which he derives his authority. Under the English statute, it has been decided that if a father devise his land to a person during the minority of his son and heir, in trust for his heir, and for his maintenance and education until he comes of age, the custody of the child is not devised within the statute. (*Bedell v. Constable, Vaugh. R. 177, 184.*) And, further, if a man devise the custody of his heir apparent to another, and mentions no time, either "during his minority" or for any other time, that this is a good devise of the custody within the act, if the heir be under fourteen at the death of the father, because by the devise the *modus habendi custodiam* is changed only as to the person, and left the same as it was as to time; but if the heir be above fourteen at the father's death, then the devise of the custody is merely void for the uncertainty; for the act did intend that every heir should be in custody till one and twenty; *non ut tamden, sed ne dintius*; therefore he shall be in this custody but so long as the father appoints, and if he appoint no time, there is no custody. (*Id.*)

Ordinarily, the guardianship continues until the ward is of full age. In case of a female, the English authorities do not agree

whether the marriage of the testamentary ward will determine the guardianship before she acquires her full age or not. The better opinion, however, seems to be, that if the will is explicit as to the duration of the trust, the guardianship will not be terminated by the marriage of the female before she is of age, against the provisions of the will. The English statute substantially declares that the guardianship shall continue till twenty-one, if so prescribed by the father, and it was held in one case that the guardianship would not be determined sooner, even by the marriage of the infant. (*Mendes v. Mendes*, 3 *Atk. R.* 625.) Lord Hardwicke held, in a case before him, that the marriage of a daughter determined the testamentary guardianship. (*Mendes v. Mendes*, 1 *Ves. Sen. R.* 89.) But in a subsequent case, the same lord high chancellor intimated that the marriage would not, of itself, determine a guardianship, though the court would never appoint a guardian to a married female infant. (*Roach v. Gowan*, 1 *Ves. Sen. R.* 160.) It would seem now, however, in England, to be quite of course to appoint a new guardian for the female ward on her marriage. (*Anonymous*, 8 *Sim. R.* 346.)

The question does not seem to be very well settled in the United States. In one case in the late court of chancery in the State of New York, the chancellor, upon the authority of *Lord Shaftsbury's case*, referred to by Lord Hardwicke in *Mendes v. Mendes*, stated that the marriage of a daughter determined the guardianship, but held that a ward of court was not discharged upon her marriage without a special order. (*Matter of Whittaker*, 4 *Johns. Ch. R.* 378, 380.) Mr. McPherson, upon the same authority of Lord Hardwicke, lays it down that testamentary guardianship is not determined by the marriage of a male ward, but the guardianship of females is determined by their marriage, and says: "This, indeed, is a necessary consequence of the rights which a husband acquires by marriage, with regard to his wife's person and property." (*McPherson on Inf.* 90.) Judge Daly, of the New York common pleas, sitting as surrogate for the city and county of New York, referring to the rule laid down by McPherson upon the subject, said, "as the reason he assigns is a satisfactory one, I shall treat the rule as established." (*Matter of Brick's estate*, 15 *Abb. Pr. R.* 12, 14.) And it was held in the State of Tennessee that the guardianship of a female ward ceases upon her marriage under age. (*Jones v. Ward*, 10 *Yerg. R.* 160.)

Sometimes, by the statute itself, the power to appoint a testamentary guardian is limited to unmarried infants, as in New York, the father, whether of full age or a minor, of a child likely to be born, or of any living child under the age of twenty-one years, and *unmarried*, may, by his deed or last will, duly executed, dispose of the custody and tuition of such child, during its minority, or for any less time, to any person or persons in possession or remainder. (2 *R. S. part 2, ch. 8, tit. 3, § 1. 2 Stat. at Large*, 156.) This would not necessarily imply that the marriage of the infant, after the guardianship actually commenced, would terminate it, and by this statute there is no distinction made between males and females. The statutes of England, and of most of the American States, provide that the guardian may be appointed by *deed* as well as by will, but it is quite evident that the deed referred to is only a testamentary instrument in the form of a deed, to operate only in the event of the father's death. This construction was put upon the English statute by Lord Chancellor Eldon, and from the reason of the thing, it must be correct. (*Ex parte Ilchester*, 7 *Ves. R.* 367.) Such a deed certainly resembles a will in some respects, in that it has no operation during life, and it has been held to be revocable at pleasure. (*Shaftsbury v. Hannam*, *Finch's R.* 323.) If the appointment is by will, the instrument need not be proved. So it is asserted by Chancellor Kent, although he does not refer to authorities to sustain the position. (2 *Kent's Com.* 225.) The instrument, however, must be a *written* will. (*Dorsey v. Sheppard*, 12 *Gill & Johns. [Md.] R.* 192.) Unless the guardian is restricted by the will or deed, he takes the custody and management of the personal estate of his ward, and the profits of his real estate; and has power to collect and receive moneys due to the minor, whether received by mortgage or otherwise, and to execute discharges and receipts therefor. (*Chapman v. Tibbitts*, 33 *N. Y. R.* 289, 290.) This power extends not only to the lands descended or left by the father, but to all the lands and goods any way purchased or acquired by the infant; although a lease made by a testamentary guardian, to last beyond the minority of the ward, is not valid after the ward attains twenty-one, and is at that time not merely voidable, but absolutely void. (*McPherson on Inf.* 92, referring to *Parry v. Hodgson*, 2 *Wils. R.* 135.) The testamentary guardian cannot assign or transfer his trust over to another, neither will his guardianship, upon his death, go to his executors or administrators; for though it

be an interest, yet it is an interest joined with a trust, which the testator might have thought the assignee unfit for. But if two or more are appointed testamentary guardians, and one of them dies, the survivor or survivors will continue guardians, for from the nature of the appointment, the authority must be joint or several. (*Mellish v. DaCosta*, 2 *Atkyn's R.* 15. *Vaughan's R.* 181. *Eyre v. Countess of Shaftsbury*, 2 *Peere Williams' R.* 102.) And it seems that in case two or more are appointed, either may qualify without the other, and without presuming to accept or renounce the guardianship. (*Kevan v. Waller*, 11 *Leigh's [Va.] R.* 414.)

If the person appointed guardian pursuant to the statute die, or refuse to take upon himself the guardianship, a guardian may be appointed by the court. So, if the person appointed become lunatic or is otherwise incapacitated to execute the trust reposed in him, or if he abuses the trust, the court may either totally remove him or appoint another, or, by obliging him to give security to make good his deficiencies, hinder him from doing any thing prejudicial to the infant. If he does not act at all, a guardian may be appointed on petition, but if, after acting, he misconducts himself, it is said that a bill must be filed. (*Ex parte Salter*, 3 *Br. Ch. Cases*, 500. *O'Keefe v. Casey*, 1 *Sch. & Lefroy's R.* 106. *Roach v. Gowan*, 1 *Ves. Sen. R.* 160.) But though the court may interpose or remove a common law guardian, it has been said that there are no instances of a testamentary guardian being wholly removed. (*Bridget Hill's case*, 3 *Salk. R.* 178.)

A testamentary guardian cannot be appointed for a natural child, except the statute of the state expressly authorize the appointment. The court, however, will adopt the nomination of the father, unless some objection be shown to the person nominated. (*Rea v. Comfort*, 2 *Str. R.* 1162. *Ward v. St. Paul*, 2 *Br. Ch. R.* 583. *Peckham v. Peckham*, 2 *Cox's R.* 46. *Barry v. Barry*, 1 *Molloy's R.* 210.)

A grandfather cannot appoint a testamentary guardian for his grandson. (*Fullerton v. Jackson*, 5 *Johns. Ch. R.* 278. *Hoyt v. Hilton*, 2 *Edw. Ch. R.* 202.) Yet if the grandfather leave an estate to the grandson upon that condition, and the father submit to it, the guardian may qualify and act. If, on the contrary, the father do not submit to the guardianship, the estate will be forfeited. (*Blake v. Leigh*, *Ambl. R.* 306.)

No form of words is usually prescribed by the statute for the appointment of a testamentary guardian, and hence, it is immaterial by what words the appointment is made, provided the father's intent is sufficiently apparent. But no proof *abunde* the will should be admitted, as by offering parol evidence of testator's intention. (*Sterkie v. Sterkie*, 3 *P. Wms. R.* 51.) Of course there is no objection to the appointment by the father of one guardian for the person of his child, and of another for his estate, unless some statute contravene.

§ 171. When no testamentary guardian has been appointed for an infant, and it becomes necessary that the child have one, a general guardian may be appointed by a court of equity, probate court or other court of similar character, having jurisdiction of testamentary matters; and this species of guardian is more common than any other kind. Courts of equity have long exercised jurisdiction for the appointment of guardians in such cases, and the origin and nature of this jurisdiction has been much discussed. Mr. Hargrave, in his notes to Coke's Littleton, says that it is not easy to determine when this jurisdiction was acquired, but asserts that such jurisdiction is not of an ancient date, and thinks that in the first place it was a usurpation, though he does not controvert the *legality* of the jurisdiction thus exercised at the time of his writing. (*Vide Harg. notes 16 to Co. Litt.* 886.)

On the other hand, Mr. Fonblanque, a writer of equal professional claims, undertakes, in a reply to Mr. Hargrave's argument, to prove that the general superintendence of infants originally belonged to the crown; and he then concludes, *a ratione*, that this superintendence, as exercised in the court of chancery, is a branch of its general jurisdiction. (*Vide 2 Fonb. Tr. Eq.* 228, *n.* 5th ed.) The arguments of these learned commentators upon the subject, are interesting and instructive, and are well worth a perusal. Lord Eldon says that Mr. Fonblanque has stated the principle very correctly. (*De Manneville v. De Manneville*, 10 *Ves. R.* 52.) And he concurs with Lords Hardwicke and Thurlow, in the opinion, that the state must of necessity place somewhere a superintending power over those who cannot take care of themselves, and that the court represents the king as *parens patrie*. (*Vide Outler v. Furman*, *Ambl.* 301. *Powell v. Cleaver*, 2 *Bro. Ch. Cas.* 449.) Again Lord Eldon says that the court has not the means of acting, except when it has property to act upon; because

it cannot take on itself the maintenance of all the children in the kingdom. It is not, however, from any want of jurisdiction that it does not act; but from a want of means to exercise its jurisdiction, by applying property for the use and maintenance of the infants. (*Wellesley v. Wellesley*, 2 *Russ. R.* 21.) Lord Redesdale considered it to be a constitutional principle, that all powers in the administration of justice which are necessary in themselves, are vested in the crown; and he asserts that the justices of Wales exercised jurisdiction in case of infants, in their courts of chancery, under a statute of Henry VIII, and that the chancellor of Durham had done the same, without any record of the origin of his authority, but without question. (*Wellesley v. Duke of Beaufort*, 2 *Bligh's N. S. R.* 124.) But it is not necessary to continue this discussion further. Suffice it to say, that the jurisdiction of a court of equity in such cases, has been long and unquestionably settled; and chancery guardians, or those appointed by courts of a similar character, have now essentially superseded all others. The practice was unknown to the common law, and at the present day the whole matter is regulated or recognized by statute.

In the State of New York, the power of appointing general guardians is lodged in the supreme court, and in the surrogates of the several counties. In Vermont, Massachusetts, Connecticut, and several other of the United States, the power is vested in the probate court. In New Jersey, the guardian may be appointed by the ordinary or orphan's court, or the surrogate, as the case may be; in Pennsylvania, by the orphan's court. (*Cornwell v. Cornwell*, 17 *Serg. & Rawle's R.* 374.) And in Ohio by the probate court. In all of the states, the court having chancery powers, has a general jurisdiction over every guardian of an infant, and he is subject to the superintendence and control of such court. (2 *Kent's Com.* 227.)

§ 172. In the State of Kentucky, it has been held that the county court has no jurisdiction to appoint a guardian for an infant while the father is living. (*Posten v. Young*, 7 *J. J. Marsh. R.* 501.) A similar rule has been declared in the State of Maryland. (*Corrie's case*, 2 *Bland's R.* 488.) A contrary doctrine has been held in Alabama. (*Hine v. Nixon*, 6 *Port. R.* 77.)

In the State of New York, it is understood that the supreme court, by virtue of its jurisdiction as a court of equity over persons laboring under disability, can take the custody of an infant from

the control of its father and give it to the mother; and that, on the same principle, the court cannot appoint a guardian for an infant during the life-time of the father or mother, and without their consent. (*Willard on Executors*, 446.) It would seem, however, that the surrogate has no power to appoint a guardian for an infant whose father is living. (*Foster v. Mott*, 3 *Bradf. R.* 412.) But in one case in the supreme court, however, a contrary doctrine was held, and the learned judge, in giving the opinion, said: "It is unusual for the surrogate to appoint a general guardian for an infant having a father, yet it may be, and sometimes is done; and then the guardian succeeds to the rights and duties of the father, subject to the authority and discretion of a court of equity." (*Clark v. Montgomery*, 23 *Barb. R.* 464, 472.) To this, Judge Willard remarks: "It was not the direct point in the case, nor does it appear to have been discussed by counsel, or to have been passed upon by the associates of the learned judge. No case is referred to as authority. Though the doctrine is entitled to great respect from its source, it is believed to be incorrect. It is not denied that the supreme court, succeeding to the authority of the late court of chancery, has the power to take the guardianship of infants from the parents, against their consent. But the surrogate has not yet been clothed with that jurisdiction; which he must have, if he can allow an infant of fourteen to ignore the control of his father, or appoint a guardian for one still younger, against the remonstrances of a living father. (*Willard on Executors*, 447, *note*.)

It seems that a general guardian cannot be appointed when there is a testamentary guardian living who has neither resigned nor been removed. (*Robinson v. Zollinger*, 9 *Watt's [Pa.] R.* 169.)

In the State of New York, the power of the surrogate to appoint a general guardian is limited to the case of a minor for whom no guardian shall have been appointed by the father by deed or will. (2 *R. S. part 2, ch. 8, tit. 3, §§ 4, 5.* 2 *Stat. at Large*, 157.)

A guardian cannot be appointed for an infant for whom a former guardian has been appointed by the court, and such former guardianship has not been removed or revoked. (*Bledsoe v. Britt*, 6 *Yerg. [Tenn.] R.* 458.) And in Kentucky, an order of the county court superseding a guardian may be revised in the court of appeals. (*Isaacs v. Taylor*, 3 *Dana's R.* 600.) And it has also been held by the same court that an order superseding a guardian, on the ground that the ward is fourteen years old, is not valid,

without notice to the guardian. (*Montgomery v. Smith*, 3 *Dana's R.* 599.)

An executor has no claim to the guardianship of the testator's child, nor the husband of an executrix; and the appointment of the administrator as guardian is never encouraged. (*Massingale v. Tate*, 4 *Hayw. [Tenn.] R.* 30. *Ex parte Crutchfield*, 3 *Yerg. [Tenn.] R.* 336. *Isaacs v. Taylor*, 3 *Dana's R.* 600.)

In New Hampshire, where the guardian is appointed by the court of probate, for each county, it is necessary that the minor reside in the county where the appointment is made. (*Judge of Probate v. Hinds*, 4 *N. H. R.* 464.) The letters of guardianship, however, are always *prima facie* evidence of a legal and regular appointment. (*Prescott v. Cass*, 9 *N. H. R.* 93.)

In Indiana, the probate court cannot remove a guardian except for breach of trust or insufficiency of security. (*Pickens v. Clayton*, 7 *Blackf. R.* 321.)

Where guardians are appointed by the court, the office determines by the death of one of them, and does not, like testamentary guardianship, survive to the others, but the survivors will usually be re-appointed — so held in England. (*Bradshaw v. Bradshaw*, 1 *Russ. R.* 528. *Hall v. Jones*, 2 *Sim. R.* 41.) The rule, however, is different in this country. Here guardianship is regarded as a trust coupled with an interest, and when two guardians are appointed and one of them dies, it continues to the survivor. (*People v. Byron*, 3 *Johns. Cases*, 53.)

On the marriage of a mother or other female who has been appointed guardian to an infant, it is a matter of course to appoint a new guardian, for she is no longer *sui juris*, and has become liable to be controlled by her husband; but she is at liberty to go before the court to propose herself as guardian. (*Anonymous*, 8 *Sim. R.* 346. *Lee v. Gowalt*, 1 *Bra. R.* 347.)

It would seem to follow from these principles, that the marriage of a female who is one of several guardians, will put an end to the whole guardianship. The court may, in its discretion, appoint one person guardian of the person, and another guardian of the estate of the infant. (2 *Kent's Com.* 227. *Willard on Executors*, 448.) The rule, however, is different in New Jersey. In that state, the guardianship of the person of the minor cannot be committed to one person, and that of his property to another. (*Tenbrook v. McCollm*, 7 *Halst. R.* 97.)

Such are some of the principles relating to the appointment of a general guardian by the courts, which, of course, may not apply to every case, for the reason that in some of the states statutes may possibly exist to the contrary.

§ 173. The general guardian is usually appointed upon the application of the infant himself, if above the age of fourteen years; and under that age, upon the application of some near relation or friend of the child. In most or all of the American States, by statutory provision, the infant may choose a guardian at the age of fourteen, subject, however, to the approval of the probate court, or some other court of a similar character. (*Vide ante*, § 92.) Courts are not, of course, bound to confirm the choice of a guardian made by the infant; they may exercise a sound discretion upon the subject, and it is their duty to do so. (*Wynne v. Always*, 1 *Murphy's* [N. C.] R. 38. *Grant v. Whitaker*, *Ib.* 231.)

The appointment of a guardian by the surrogate in New York, for an infant under fourteen, terminates at that age, if the infant, on becoming fourteen, sees fit to nominate a different person; and his choice is allowed by the surrogate. Again, the surrogate cannot appoint a guardian for an infant over fourteen years of age, against the consent of the infant. The supreme court succeeding to the jurisdiction of the late court of chancery, is not thus restricted. That court can appoint a guardian contrary to the nomination of the infant. (*Willard on Ex.* 447.) So a guardian appointed by the court of chancery, or other court possessing full chancery jurisdiction, continues such guardian until the infant is twenty-one years of age, unless sooner removed by the court appointing him; and the infant, upon arriving at the age of fourteen, cannot have a new guardian appointed as of course. (*Matter of Dyer*, 5 *Paige's* R. 534. *Matter of Nicol*, 1 *Johns. Ch. R.* 25.)

Usually some near relative of the infant possessing the requisite qualifications, will be selected as the guardian for the infant, and in making the selection it is the duty of the court to consult the best interests of the infant, taking into consideration not merely his temporary welfare, but the state of his affections, attachments, his training, education and morals. (*Foster v. Mott*, 3 *Brad. [N. Y. Sur.] R.* 409. *Bennett v. Byrne*, 2 *Barb. Ch. R.* 216.)

The declared wishes of a deceased parent are entitled to much weight in the selection of a guardian of an infant, and the wish of a dying parent should have a preponderating influence in the selec-

tion, other things being equal. (*Underhill v. Dennis*, 9 *Paige's R.* 202. *Bennett v. Byrne*, 2 *Barb. Ch. R.* 216.) So, other things being equal, an uncle of the infant will be preferred to a stranger. (*Morehouse v. Cooke*, *Hop. Ch. R.* 226.)

The fact that the estate came from the father is no ground for a preference of the father's relation in the appointment of the guardian; and it seems that a surrogate may appoint one of his own relatives such guardian. (*Underhill v. Dennis*, *supra*.) That the person applying to be appointed guardian is a trustee to apply the income of an estate to the support and education of the infant, is a circumstance in his favor. (*Bennett v. Byrne*, *supra*.) Other things being equal, the mother of a female child, whose father is dead, is the most proper person to be intrusted with her nurture, care and custody, and should therefore be appointed her guardian. (*The People v. Wilcox*, 22 *Barb. R.* 178.)

It is requisite that the person appointed be *sui juris*—"of his own right," and capable of performing the appointment. He must not have any interest adverse to the interest of his ward, and if he is known to have any such, he will not be appointed. A person under his full age, or a minor, cannot of course be appointed to take care of another minor; and one under the power of another, although possessing understanding as a married woman, is not qualified for the trust. (1 *Bouvier's Institute*, 42.)

An executor of an estate will not be appointed the guardian of an infant who claims the estate, because there may have been different interests, and the law does not put the duties of a man in opposition to his interest. (*Jackson v. Sears*, 10 *Johns. [N. Y.] R.* 435. *And vide Parker v. Lincoln*, 12 *Mass. R.* 16.)

The appointment of a guardian, made by the court, is deemed to be valid until it is reversed or set aside; and it cannot be assailed in a collateral way, or by proceedings upon *habeas corpus*. (*The People v. Wilcox*, *supra*.)

§ 174. The *modus operandi* for procuring the appointment of a general guardian, is prescribed by statute and the practice of the several courts having jurisdiction; but this subject does not come within the plan of this work, and it is therefore omitted. It only remains here to state some general principles in regard to the powers, duties and accountability of the general guardian.

The guardian is the proper judge as to the school or university at which his ward shall be educated; and the court will compel the

obedience of the ward to the selection, unless some reasonable objection is shown. (*Tremain's case*, *Strange's R.* 168. *And vide Hall v. Hall*, 3 *Atk. R.* 721.) But if there are two or more guardians appointed for the ward, and they disagree as to the mode of education, the court will exercise its own discretion on the subject, and will not regard itself bound by the wishes of the majority upon the subject. (*Hall v. Hall*, *supra*.)

The powers and duties of guardians are frequently, and perhaps generally, declared by express provision of statute. For example, in the State of New York, it is provided that every general guardian, whether testamentary or appointed, shall safely keep the things that he may have in his custody belonging to his ward, and the inheritance of his ward, and shall not make or suffer any waste, sale or destruction of such things or of such inheritance, but shall keep up and sustain the house, gardens and other appurtenances to the land of his ward, by and with the issues and profits thereof, or with such other moneys belonging to his ward, as shall be in his hands; and shall deliver the same to his ward when he comes to his full age, in as good order and condition, at least, as such guardian received the same, inevitable decay and injury only excepted; and he shall answer to his ward for the issues and profits of real estate received by him, by a lawful account. And if the guardian make or suffer any waste, sale or destruction of the inheritance of his ward, he will lose the custody of the same, and of his ward, and will forfeit to the ward thrice the sum at which the damages may be taxed by a jury. (2 *R. S. part 2, ch. 8, tit. 3, §§ 20, 21.* 2 *Stat. at Large*, 159, 160.) Here it will be observed that the law is very particular and jealous with respect to the rights and property of infants, and the courts are equally scrupulous and guarded.

The administration of the guardian extends over the person and property of the ward; and as a general principle, it may be said that the guardian stands to the ward *in loco parentis*. This, of course, is to be understood in a qualified sense, for the guardian does not enjoy all the rights and possess the full powers of the parent. (*Vide Bass v. Cook*, 4 *Porter's [Ala.] R.* 390.)

According to Judge Bouvier, the guardian is bound to take care of the person of the ward; to exercise, when needful, proper power of restraint; to place his ward apprentice, or in some situation to earn his own living; and to represent him in all civil acts and

in actions. (1 *Bouv. Inst.* 142.) The care of the person includes the obligation to provide for the support and education of the ward, and he must use a sound discretion in these respects; but in cases of doubt or difficulty he may apply to the proper court for directions. (*Ib.* 143, and *Harris v. Richardson*, 4 *Dev.* [*N. C.*] *R.* 279. *Bybec v. Thorp*, 4 *B. Mon.* [*Ky.*] *R.* 313.)

The guardian may properly restrain his ward from acts which are illegal or improper, and he is authorized, in case of necessity, to place him out apprentice, though it is said that in an act like this, he should take the precaution of consulting the mother, if living, or if not, some other relations of the ward. The business, however, to which the minor is bound, must be a proper one, and it has been held that the guardian cannot bind his ward as a servant, unless by authority of some statute. (1 *Bouv. Inst.* 143. *Wood v. Gale*, 10 *N. H. R.* 247. *Respublica v. Kepple*, 1 *Yeates* [*Pa.*] *R.* 233.)

§ 175. The guardian may lawfully hold possession of his ward's land during the minority of the ward, and may lease such land during guardianship, but no longer. (*Bacon v. Taylor*, *Kirby's* [*Conn.*] *R.* 368. *Ross v. Gill*, 4 *Call's* [*Va.*] *R.* 250. *Truss v. Old*, 6 *Rand.* [*Va.*] *R.* 256. *Magruder v. Peter*, 4 *Gill & Johns* [*Md.*] *R.* 323. *Genet v. Tallmadge*, 1 *Johns. Ch. R.* 561. *Snook v. Sutton*, 5 *Halst.* [*N. J.*] *R.* 133. *Jones v. Ward*, 10 *Yerg.* [*Tenn.*] *R.* 160. *Johnson v. Carter*, 16 *Mass. R.* 443. *Watkins v. Peck*, 13 *N. H. R.* 361.) The guardian being in possession of his ward's land by right, may maintain an action of trespass or ejectment against any person entering upon them without right. (*Holmes v. Seeley*, 17 *Wend. R.* 75, 78, and cases cited.)

The guardian has no right to sell and convey the real estate of his ward absolutely without the special authority of the court, because the nature of the trust does not require it. (*Field v. Schieffelin*, 7 *Johns. Ch. R.* 150, 154.)

The guardian must necessarily have more unlimited control over the personal estate of his ward than over the real estate of such ward. The personal estate of the ward may, therefore, be invested, called in, and reinvested, and changed and otherwise disposed of, as the exigency of the trust, in the judgment of the guardian, may seem to require. In every instance, however, the guardian acts under responsibility to his ward for the faithful and judicious discharge of his trust. (*Field v. Schieffelin*, *supra.*)

The guardian has no right to trade with himself, on account of his ward, nor buy or use his ward's property for his own benefit. All advantageous bargains which he makes with his ward's funds will inure to the benefit of his ward, at his election. The guardian cannot convert the personal property of his ward into real estate, or buy land with the money of his ward. Should he do so, his ward, when he attains his full age, may take the land, or the money with interest, at his election. If he takes notes or other securities for money belonging to his ward, in his own name, this will be regarded as a conversion of the property to his own use, and he is *prima facie* accountable for it. Thus, if he surrenders contracts for lands, and takes deeds in his own name, and pledges his personal responsibility for a part of the purchase-money, this will be held a conversion of the contracts to his own use, and the ward may adopt the transaction, or claim from the guardian the value of the land contracts, as he sees fit to elect. (*White v. Parker*, 8 Barb. R. 48.)

When personal property comes into the hands of the guardian, except it be money on interest, it is a general rule that the guardian should sell it and put the money at interest; or if there are debts which the ward must pay, he ought to apply it to the payment of the debts; for such property produces no interest, while the debt of the ward is increasing, perhaps, by reason of the accumulating interest. This principle is established and sustained by numerous authorities. (*Reeves' Dom. Rel.* 326. *Rogers v. Rogers*, Hop. Ch. R. 515. *Clarkson v. De Peyster*, Ib. 424. *Smith v. Smith*, 4 Johns. Ch. R. 281. *Evertson v. Tappen*, 5 ib. 497.) This principle applies to every species of personal property, though it is not usual to sell family pictures, plate, watches and personal ornaments, but to keep them, as they are not of a perishable nature, by which to remember their former proprietors. Nor would it be improper, in certain other peculiar cases, to preserve other property; as when the ward is nearly of age, and is soon to enter upon a well stocked farm, which is his own property, the guardian will be justified in not selling off the stock. (*Reeves' Dom. Rel.* 326.)

The guardian should not mix up his ward's property with his own, and if he do so, he so far makes it his own as to render himself liable for it if lost. It has been held that if a guardian deposits his ward's money in his own name and it is lost, he is

accountable for it. (*Jenkins v. Walter*, 8 *Gill & Johns*. [Md.] R. 218.)

Should the guardian neglect to invest the funds of his ward, which he may and ought to make productive, he will be charged with simple interest for the money; and should there be gross delinquency, such as refusing to render an account, or violation of an express direction of the trust, compound interest may be charged. (*Clarkson v. De Peyster*, *Hop. Ch. R.*, 424.) But a guardian is not required to exercise the extraordinary enterprise, perseverance and speculating sagacity and ingenuity which give some men peculiar facility for the acquisition of property. While acting within the scope of his powers, he is only bound to fidelity and ordinary diligence and prudence in the execution of his trust. Holding guardians to a more strict responsibility, would prevent men from assuming duties which are as necessary in society as they are profitless, and sometimes thankless, to those who perform them. (*White v. Parker*, 8 *Barb. R.* 48, 53.) He should exercise the same care and management in the affairs of his ward that any prudent man would exercise over his own affairs; and what is regarded the requisite diligence and prudence will depend upon the attendant circumstances of each case. (*Glover v. Glover*, 1 *McMullin's* [S. C.] R. 153. And *vide De Peyster v. Clarkson*, 2 *Wend. R.* 77, 106. *Smith v. Smith*, 6 *J. J. Marsh.* [Ky.] R. 238. *Lovell v. Minot*, 20 *Pick. R.* 116.)

§ 176. The guardian may bring an action in his own name for an injury to any property of his ward in his actual possession, or to which he has the right of possession. (*Fugua v. Hunt*, 1 *Ala. R.* 197. *Sutherland v. Goff*, 5 *Port.* [Ala.] R. 508. And *vide Sylvester v. Ralston*, 31 *Barb. R.* 286, 289.)

For intermeddling with the issues and profits of real estate belonging to an infant, an action, it seems, will not lie in the name of the infant, but the suit must be brought in the name of the guardian, for the reason that the issues and profits belong to him, and he must answer to his ward for them. (*Beecher v. Crouse*, 19 *Wend. R.* 306, 308.) A guardian may maintain an action for damages for the seduction of his ward. (*Fernslee v. Meyer*, 3 *Watts & Serg.* [Pa.] R. 416.) Formerly the action for seduction could only be maintained when the relation of master and servant actually existed between the plaintiff and the girl seduced; and it was deemed necessary to prove acts of service by the girl. But

now greater liberality is shown in applying a remedy for injuries of so deep and delicate a character, and hence the action may be brought by any person who stands *in loco parentis* to the girl seduced, or when the constructive relation of master and servant exists. (*Vide Bartley v. Richtmyer*, 2 Barb. R. 182.) The doctrine that the guardian may bring the action is recognized in a case in the New York court of appeals. (*Bartley v. Richtmyer*, 4 N. Y. R. 38, 45.) It has been held that *testamentary* guardians, at any rate, stand *in loco parentis*, and supersede a guardian appointed by the orphan's court. (*Vanhouten's case*, 2 Green's [N. J.] Ch. R. 220.)

A guardian of a female ward is justified in stopping her elopement, and in obtaining her clothes, in case she has eloped. (*Barton v. Taylor*, 12 Eng. C. L. R. 69.)

The guardian may maintain an action in the ward's name to recover property obtained from the ward by fraud before the guardian was appointed. (*Somes v. Skinner*, 16 Mass. R. 348.) But he cannot prosecute a suit in his own name, after his female ward's marriage, for a debt due her before such marriage. (*Barret v. Commonwealth*, 4 J. J. Marsh. [Ky.] R. 389. 5 *ib.* 286.)

A general guardian has power to execute a release, to render a witness competent for the infant. (*Capehart v. Hesey's Adm.* 1 Hill's [S. C.] R. 499.)

The rights and powers of the guardian over the person and property of his ward are strictly local, and cannot be exercised in other states than the one in which he received his appointment. (*Morrel v. Dickey*, 1 Johns. Ch. R. 156. *Saline v. Gilman*, 1 N. H. R. 193.) Nor has the guardian any authority over the real property of his ward situate in other counties, for such property is governed by the law *rei sitae*. (2 Kent's Com. 227, citing Story's Com. on the Conflict of Laws, 414-417.) But it is the duty of a guardian to take care of and account for the money of his ward from whatever source derived, and he would, therefore, be accountable as guardian for money received by him in the state where he received his appointment, for the lands of his ward in another state, when legally sold. (*Duncan v. Patty's Heirs*, 5 Dana's [Ky.] R. 223.)

If there be two or more guardians, one of them has a right to receive a legacy for the ward from the executor and to give him a receipt for the same, and the acquittance to him is good without

requiring a joint receipt from them all. On the same principle, if the characters of executor and of receiving guardian be united in the same person, the guardian who charges himself, discharges himself as executor. (*Alston v. Mumford*, 1 *Brockenbrough's* [U. S.] R. 266. *Vide also Graham v. Davidson*, 2 *Dev. & Batt.* [N. C.] R. 155.)

A bill cannot join a demand for a debt due by an individual as an administrator or guardian, with one for a debt due by the same individual in his private capacity. (*Wren v. Gayden*, 1 *Howard's* [U. S.] R. 365.)

A guardian has no power to sell his ward's real estate, and should he attempt to do so, it has been held a sufficient cause for his removal. (*Ex parte Crutchfield*, 3 *Yerg.* [Tenn.] R. 336. *Mason v. Wait*, 4 *Scam.* [Ill.] R. 127. *Caplinger v. Stokes*, 1 *Meigs'* [Tenn.] R. 175. *Eckford v. De Kay*, 8 *Paige's* R. 89.) Neither can the guardian apply the ward's *principal* to his education or support, without an order of court. (*Meyers v. Wade*, 6 *Rand.* [Va.] R. 444. *Morn v. Cason*, 1 *How.* [Miss.] R. 53. *Ryber v. Thorp*, 4 *B. Mon.* [Ky.] R. 313.)

It is regarded as a violation of duty on the part of a guardian to permit his infant ward to live in idleness, and to support him out of his estate, when he is capable of supporting himself by his industry. (*Clark v. Clark*, 8 *Paige's* R. 152.)

§ 177. The guardian is required to furnish an account to the court that appointed him, whenever called upon, but always at the determination of his guardianship; and if he neglects to do so, he must be cited by the court and required to render such account. (*Bailey v. Rogers*, 1 *Greenl.* [Me.] R. 186. *Robertson v. Robertson*, 1 *Root's* [Conn.] R. 51.) And obedience to an order requiring the guardian to account, may be enforced by attachment, as for a contempt. (*Doran v. Dempsey*, 1 *Brad.* [N. Y. Sur.] R. 490. *Seaman v. Duryea*, 11 *N. Y.* R. 324.)

The court of chancery, or other court having general equity jurisdiction, may call upon a guardian to account, though he may be a testamentary guardian, or one appointed by an inferior court, and such guardian is responsible to the former court for his conduct. (*Matter of Andrews*, 1 *Johns. Ch. R.* 99. *Matter of Dyer*, 5 *Paige's* R. 534.)

In the State of New York, the ward, on arriving at age, may compel the guardian to account without showing any cause; and

previous to his attaining to full age, the guardian may be compelled to render his account upon the application of the ward, or any near relative of the ward. (2 *R. S. part 2, ch. 8, tit. 3, § 11. 2 Stat. at Large*, 158.) But the administrator of a deceased guardian cannot be called upon to account before the surrogate. The only remedy in such a case is by complaint in a court of equity. (*Farnsworth v. Oliphant*, 19 *Barb. R.* 30, 35. *Matter of Van Wyck*, 1 *Barb. Ch. R.* 565, 568.)

Immediately on the death of the ward all the guardian's functions cease, because the property in his hands has become, by that event, vested in others; and, of course, the guardian is then required to make out and render his account. (1 *Bow. Inst.* 147, 148.) And we have seen that when a female ward marries, the better opinion is, that the guardianship determines; and then the guardian will be required to render his account. (*Ante*, § 170.)

An action will not lie against the guardian, or against the ward, before the accounts are settled. (*Nutz v. Reutter*, 1 *Watt's [Pa.] R.* 229. *Smith v. Philbrick*, 2 *N. H. R.* 395. *Davis v. Ford*, 7 *Ohio R.* 104. *Stillwell v. Mills*, 19 *Johns. R.* 304. *Anderson v. Maddow*, 3 *McCord's [S. C.] R.* 237.) But a suit may be sustained on the guardian's bond, for not delivering up the property of the ward, although no order has been made by the court. (*Jarrett v. The State*, 5 *Gill & Johns. [Md.] R.* 27.) And in Maryland, the action may be brought against the surety, although the principal, residing in the same county, had not been sued. (*Ib.*) And the sureties are not released from their responsibility, although a new bond is executed with other sureties. (*McMath v. The State*, 6 *Har. & Johns. [Md.] R.* 98.) Neither are the sureties discharged by the neglect of the county court, to compel the guardian to render the inventory and make his annual settlements according to the bond. (*Commonwealth v. Preston*, 5 *Mon. [Ky.] R.* 584.) But in the State of North Carolina, it has been held that the sureties will be discharged, unless the infant, on arriving at age, have a full settlement with his guardian of all matters within three years, and either sue him for any balance due, or notify the sureties of the deficiency. (*Johnson v. Taylor*, 1 *Hawk's R.* 271.)

If the legal effect of the guardian's bond is *several*, a separate suit may be maintained for the benefit of each ward. (*Barnett v. Commonwealth*, 5 *J. J. Marsh. [Ky.] R.* 286.) A guardian's

bond is not discharged by another bond given on settlement with the ward, after she comes of age. (*Hamlin v. Atkinson*, 6 *Rand. [Va.] R.* 574.)

In New York, the bond cannot be sued until proceedings for an account have been had against the guardian. (*Salisbury v. Van Hoesen*, 3 *Hill's R.* 77.) But the contrary doctrine is held in the State of Tennessee. (*The Justices, etc. v. Willis*, 3 *Yerg. R.* 461.) In Maine, where the only breach of the bond was a neglect to return an inventory of the ward's estate within a proper time, and the estate was not subject to the payment of debts, nominal damages only were allowed in an action upon the bond. (*Fuller v. Wing*, 17 *Maine R.* 222.) But a plea to the complaint in such a case, that no damage had happened to the ward from the breach of the bond, would be had. (*Commonwealth v. Preston*, 5 *Mon. R.* 537.) The liability of the surety is not limited to the property owned by the ward when the bond was taken, but extends to all property subsequently acquired. (*Gray v. Brown, Rich. [S. C.] R.* 351.) But a surety is not liable in Massachusetts, for a breach of the guardian's duty in respect to a sale of the ward's real estate pursuant to a license, under the statute of 1783, ch. 32. (*Lyman v. Conkey*, 1 *Met. R.* 317.)

It has been held that the guardian's bond must be taken in open court, and not in the clerk's office, it being a judicial and not a ministerial act. (*Page v. Taylor*, 2 *Munf. [Va.] R.* 492.) In North Carolina, the bond should be made to the justices present in court, granting the guardianship, and a bond to A B and the rest of the justices, is not in pursuance of the act of 1762 in that state. (*Justices, etc. v. Wilson*, 2 *Dev. R.* 6. *Same v. Dozier*, 3 *ib.* 287. 4 *ib.* 392.) And a bond in the same state, payable "to the justices of Caswell county court," has been held to be void at common law, and also by statute. (*Same v. Buchanan*, 2 *Murph. R.* 40.) But unless the statute requires the bond to be taken in open court, it will be binding, if executed out of court, to the proper parties and in the proper form.

In Alabama, the action upon the guardian's bond must be brought in the name of the judge of the county court. (*Davis v. Dickson*, 2 *Stewart's R.* 370.)

In Kentucky, the assignor of a decree in favor of a ward, against the administrator of his guardian, may sustain a suit as relator on the administrator's bond. (*The Commonwealth v. Boston*, 3 *B.*

Mon. R. 293.) In chancery, an infant may appear by his *prochein ami*, and call his guardian to an account, even during minority, and the court will even permit a stranger to come in and complain of the guardian for his negligence and abuse of the infant's estate. (*Earl of Pomfret v. Lord Windsor*, 2 *Ves. R.* 484. *Duke of Hamilton v. Lord Mohr*, 1 *P. Wms. R.* 119.) By the practice in a court of chancery jurisdiction in this country, the infant is allowed one year; after arriving at majority, in which to investigate the guardian's accounts, and the guardian is not entitled to an absolute discharge until the expiration of that time. (*Matter of Van Horne*, 7 *Paige's R.* 46.) And the guardian is liable to account at all times. (*In re Burke*, 1 *Ball & Bea. [Irish] R.* 74.) In some states this matter is regulated by statute, compelling an account once in two years, and the like. A settlement in the orphan's court in Maryland, is not conclusive in a court of equity. (*Crapster v. Griffith*, 2 *Bland's R.* 5. *Vide also on this and kindred subjects, Bing. on Inf.* 175 *et seq. notes* 7, 8.)

Such are some of the leading principles with respect to the duties, obligations and rights of guardians, as established by the adjudged cases, and it is unnecessary to elaborate further in this place. It may be added, however, that testamentary guardians stand on the same footing as other trustees, and may be called to account, directed in their conduct, or removed from office by a court of competent jurisdiction, in all proper cases. (*Willard's Ex.* 453.)

§ 178. The connection between guardian and ward is so close, the guardian's opportunities of acquiring knowledge of the ward's property and influence over his mind are so many and various, that when a man acts as guardian, or trustee in the nature of guardian, for an infant, the courts are extremely watchful to prevent that person taking any advantage, either by a hasty and ill-considered settlement of accounts, or by way of direct bounty, immediately upon his ward or *cestui que trust* coming of age, and at the time of settling the account or delivering up the trust. This rule is applicable wherever the connection and influence of guardianship have continued, though the ward may have been of age for some time before the date of the transaction. Undoubtedly, if, after the ward or *cestui que trust* comes of age, and has been actually put into possession of the estate, he thinks fit, when *sui juris*, and at liberty, to grant a reward for care and trouble, the court could never set aside such a transaction; but the courts guard against

this being done at the very time of accounting or delivering up the estate, as the terms on which the guardian will perform that duty; and so far has this vigilance been carried, that the relations of guardian and ward are in equity decisive against the validity of transactions which, between strangers, could not be impeached; and it is scarcely possible, in the course of the connection of guardian and ward, any more than in that of attorney and client, or trustee, and *cestui que trust*, that a transaction shall stand, purporting to be a bounty for the execution of an antecedent duty. (*McPherson on Inf.* 260, and *vide also Huguenin v. Baseley*, 14 *Vesey's R.* 273. *Dent v. Bennett*, 4 *Mylne & Craig's R.* 269.)

In illustration of this principle it may be stated, that when accounts were settled between a guardian and his female ward, a few months after the latter came of age, and were signed by her without having been examined by any one on her behalf, and without any delivery of vouchers, the accounts, too, being applicable only to a part of the receipts and expenditures, and waived by the guardian's delivering in a subsequent account, purporting to be an account from the commencement of the guardianship, the accounts settled between the guardian and ward were set aside. (*Wyck v. Packington*, 3 *Bro. Par. Cas.* 46.) So, also, where a guardian, after his ward attained full age, continued to manage the property, at the request of the ward, and before the accounts of his receipts and payments during the minority were settled, it was held that this was, in effect, a continuance of the guardianship as to property, and that he must account on the same principle as if they had been transactions during the minority. (*Mellish v. Mellish*, 1 *Siv. & Stu. R.* 138. *McPherson on Inf.* 261.) Under these circumstances an injunction was granted, in terms, to restrain the guardian from proceeding in an action to recover the balance claimed by him on account of the transactions after his ward came of age. (*Id.*)

So, also, it has been held in this country, upon the same principle, that contracts made by guardians with their wards, immediately after they became of age, are regarded with suspicion by the court of chancery, and if found to have been made with a view to speculation, or upon the appearance of the least unfairness, they will be disregarded. (*Richardson v. Linney*, 7 *B. Mon. [Ky.] R.* 571.) However, a full and fair settlement between guardian and ward, after the ward's majority, determines the trust, and will be recog-

nized by the courts. (*Coplinger v. Stokes*, 1 *Meigs*' [Tenn.] R. 175.) And the settlement of a guardian's account is so far conclusive upon the infant as to throw upon him the burden of proving an error. (*Dakin v. Demming*, 6 *Paige's R.* 95.) A parol discharge, however, of a guardian by his ward, just after coming of age, without an account, will not bar an account against the guardian. (*Admr. of Johnson v. Exr. of Johnson*, 2 *Hill's* [S. C.] Ch. R. 286.) But a release given by a ward, six months after she comes of age, to her guardian, freely and fairly, without fraud, misrepresentation, or undue means to obtain it, is valid. (*Kirby v. Taylor*, 6 *Johns.* [N. Y.] Ch. R. 242. *Vide also Kirby v. Turner*, *Hop. R.* 309. *Fish v. Miller*, *Ib.* 267. *Rapalje v. Hall*, 1 *Sand. Ch. R.* 399. *Gale v. Wells*, 12 *Barb. R.* 84.)

§ 179. In the account of the guardian, all the transactions must appear which have taken place between the guardian and the ward; and, if the guardian were indebted, in his individual account to himself as guardian, he will be presumed to have received the amount in his capacity of guardian. It should contain all the moneys which have come to his hands, the dates when received, and show how the money has been employed. On the other hand, it ought to state all the moneys disbursed, for what purpose they have been paid out, the date when paid, and to whom. Interest ought to be charged on both sides. When one person is guardian of several wards, he is required to keep separate accounts with each. (1 *Bouv. Inst.* 145, 146, *referring to Crowell's appeal*, 2 *Watts*' [Pa.] R. 295. *O'Neil v. Herbert*, *C. W. Dudley's Eq. R.* 30. *Admr. of Johnson v. Exr. of Johnson*, 2 *Hill's* [S. C.] Ch. R. 285. *Hayward v. Ellis*, 13 *Pick. R.* 272. *Karr v. Karr*, 6 *Dana's* [Ky.] R. 3. *Hendricks v. Huddleston*, 5 *Sme. & Marsh.* [Miss.] Ch. R. 422. *Vide also Wait v. Wait*, 1 *Brad.* [N. Y. Sur.] R. 345.)

It is the duty of guardians, when necessary, to employ able counsel, and they will be allowed, in their account, the customary charges for such services; though a guardian will not be allowed to charge his ward with fees of counsel unnecessarily employed, to represent him as a co-distributee, before his appointment to the guardianship. Nor will he be allowed accounts against his ward to affect the capital of his ward. The income may be anticipated, and in extraordinary cases part of the capital appropriated, by an order of the court, but not otherwise. (*Chapline v. Moore*, 7 *Mon.* [Ky.] R. 159, 166.)

When the personal services of an infant in the family of an assumed guardian are equal to her maintenance, she will not be charged with her maintenance. (*Bush v. White*, 2 *Mon. R.* 101. *Wait v. Wait*, 2 *Brad. [N. Y. Sur.] R.* 345.) And when minors were invited by their guardian to reside with him, gratuitously, they will not afterward be made to pay for their board. But the guardian will be allowed for clothing and other necessities furnished his ward. (*McDowell v. Caldwell*, 2 *McCord's [S. C.] Ch. R.* 56.)

It has been held that proof of parol declarations of a guardian, that she did not intend to charge her ward for board, is admissible to repel a charge for board in her life-time, exhibited by her representative after her death. (*Hooper v. Savage*, 1 *Munf. [Va.] R.* 119.)

When the charges in the accounts of a guardian exceed the annual income of his ward's estate, he must make out at least as clear a case before the court for the subsequent sanction of his expenditures, as he would have been required to do on an application for its authority to make them in the first place. (*Holmes v. Logan*, 3 *Strobhart's [S. C.] Eq. R.* 31.)

The guardian cannot be allowed in his account for services rendered for the ward before he was appointed guardian; and a promise of the ward to pay for them, made after he became of age, does not make them proper matters of charge on the accounting. (*Clowes v. Van Antwerp*, 4 *Barb. R.* 416.)

When the guardian advances money out of his own pocket for the erection of buildings upon the land of his ward, without the order of a court of equity, he cannot have the amount allowed in his accounts, nor can he recover the amount of his ward. (*Hassard v. Rowe*, 11 *Barb. R.* 22.)

Of course, the guardian will be allowed for his reasonable expenses and commissions for services incurred in the discharge of the trust, and these are generally prescribed by statute or the rules of the courts, and there is little or no difficulty in ascertaining what they are. (*Vide Matter of Roberts*, 3 *Johns. Ch. R.* 42. *Matter of Kellogg*, 7 *Paige's R.* 265. *Booth v. Sineath*, 2 *Strobhart's [S. C.] Eq. R.* 31. *Clowes v. Van Antwerp*, 4 *Barb. R.* 416. *Ib.* 2 *Seld. R.* 466. *Morgan v. Morgan*, 39 *Barb. R.* 20. *Rapalje v. Hall*, 1 *Sand. Ch. R.* 399.)

§ 180. A guardian *ad litem* is a person appointed by the court when an infant is sued in a civil action or proceeding, to defend

the same; and in some instances the person appointed to prosecute an action for an infant in court. The peculiarities and particulars of this office, how and under what circumstances appointed, and the duties, powers and responsibilities pertaining to it, have been fully discussed in a previous chapter, and reference to that chapter will suffice in this place. (*Ante*, *ch.* 12.) A special guardian is one who is appointed for a special purpose, to represent the infant in some special proceeding, and perform some special act, which the infant would be required to perform, or might perform, if of full age. For example, the person appointed to sell and convey the real estate of an infant in behalf of the infant; or the person appointed by the court to represent the infant in proceedings to compel the specific performance of a contract of his ancestor by the infant heir, whose duty it is to examine into the circumstances of the case, and protect the rights of the infant in the proceedings; and if a conveyance is ordered, to execute it on behalf of the infant. In all these cases of special guardianship, the proceedings are regulated by express provisions of statute, and when the particular transaction for which the appointment was made is accomplished, the duties of the special guardian are at an end. The office is entirely temporary in its nature, and is limited to a single ultimate end. Whatever the special guardian does is done for the infant, and the papers he executes are executed in the name of the infant, and all in pursuance of the special order of the court. The act when done, or the conveyance when made, pursuant to the order of court, is usually made, by statute, as good and effectual in the law as though done or made by the infant when of full age. The provisions of the statute must be strictly observed in all these cases, or the infant will not be bound by the act of the guardian. It is wholly unnecessary to dwell upon the subject here, because the matter will be recurred to hereafter, when the proceedings in these special cases of infants, and the rules by which they are governed, will be briefly considered and explained.

CHAPTER XVI. /

CUSTODY OF INFANTS—WHO ENTITLED TO SUCH CUSTODY—CUSTODY BY STATUTE—JURISDICTION OF COURTS IN QUESTIONS OF CUSTODY—INTERFERENCE OF COURTS BY HABEAS CORPUS—CUSTODY IN CASES OF ILLEGITIMATE INFANTS—LIBERTY OF CHOICE BY INFANTS—CUSTODY IN CASES OF GUARDIANSHIP.

§ 181. Long, elaborate and tedious treatises have been written and published upon the subject of the custody of infants, the defects of the law in relation to it, and how the same may be remedied; the uncertainty prevailing in the application of the law to the different cases as they arise, and the view which the courts seem to take of the frequently conflicting wishes and claims of parents and guardians where family differences unhappily occur, or other circumstances exist which call for the interference of judicial authority; but it is believed that a bird's-eye view may be taken of the subject, and all the general and more important rules and principles governing such cases may be grouped together in a comparatively small compass, and stated in a comparatively few paragraphs and points.

The Roman law gave the father absolute power over the persons of his children. According to some authors the atrocious power of putting his children to death and of selling them in the open market, was vested in the father from the earliest times of the republic. Toward the mother the law enjoined upon children the duty of showing due reverence and respect, and punished any flagrant instance of the want of it; but beyond this she had no other claim.

In France, by the Civil Code, the authority over infants is given exclusively to the father during his life, and after his death the right of the mother accrues. But the father may appoint by will a special adviser to act in conjunction with the mother, without whose concurrence she can perform no act of guardianship.

The general rule of law in England is that the legal power over infant children belongs to the father, and that during his life the mother has none. (*Forsyth on Infants*, 2-11.) According to Judge Blackstone, "a mother, *as such*, is entitled to no power, but only to reverence and respect." (1 *Black. Com.* 453.) And according to the common law, the father has a right to the exclusive custody of his child, even at an age when it still requires nourishment from

its mother's breast. "The law is perfectly clear as to the right of the father to the possession of his *legitimate* children, of whatever age they may be." (*Ex parte McClellan*, 1 Dowl. P. C. 34.) Again, "it is the universal rule, with some exceptions, that the father is entitled to the custody of a young child even against the will of the mother. In case of there being no father, then the mother is the person next entitled to its custody." (*Ex parte Glover*, 4 Dowl. P. C. 293.) This last assertion must be taken with the proviso that no testamentary guardian has been appointed by the father, for a testamentary guardian is expressly authorized by statute, and when one is appointed, he has the custody of the child, in defiance of the mother.

§ 182. The law upon the subject in this country is substantially the same as in England, except where the same has been occasionally changed by statute. Chancellor Kent, in his invaluable commentaries, sums up the matter thus:

"The father may obtain the custody of his children by the writ of *habeas corpus*, when they are improperly detained from him; but the courts, both of law and equity, will investigate the circumstances, and act according to sound discretion, and will not always, and of course, interfere upon *habeas corpus*, and take a child, though under fourteen years of age, from the possession of a third person, and deliver it over to the father against the will of the child. They will consult the inclination of an infant, if it be of a sufficiently mature age to judge for itself, and even control the right of the father to the possession and education of his child, when the nature of the case appears to warrant it." (2 *Kent's Com.* 194.)

The same learned author states in another place: "And in consequence of the obligation of the father to provide for the maintenance, and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and to the value of their labor and services. There can be no doubt that this right in the father is perfect, while the child is under the age of fourteen years. But as the father's guardianship, by nature, continues until the child has arrived to full age, and as he is entitled by statute to constitute a testamentary guardian of the person and estate of his children until the age of twenty-one, the inference would seem to be, that he was, in contemplation of law, entitled to the custody of the persons, and to the value of the services and labor of his children during their minority." (2 *Kent's Com.* 193.)

And once again the learned chancellor says: "The father, and, on his death, the mother, is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. But the courts of justice may, in their sound discretion, and when the morals, or safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere." (2 *Kent's Com.* 205.)

§ 183. Chancellor Kent cites as authorities to sustain his position, numerous cases, both English and American, which settle the doctrine as he states it. From the authorities collected in the note subjoined to the text, the learned author, in substance, lays it down: though the court of chancery has jurisdiction to control the father's possession of his child, yet in England a court of common law has no such delegated authority. In the case of *The King v. Greenhill* (4 *Adolph. & Ellis*, 624), it was held, that the father was entitled to the custody of his legitimate children when they were too young to exercise a discretion as to their custody. The father's right is superior to that of the mother, unless it appears that the child would be exposed to cruelty or gross corruption. Upon *habeas corpus* the chancellor of England has the same jurisdiction as a judge, and has nothing to attend to but personal ill-usage to the child, as a ground for taking it from the father. But when there is a cause *in court*, other circumstances may be considered, and if the father cannot educate the child in a manner suitable to the property given to it by another, the court will not permit the father to withhold from it that education; and in a special case of the kind, chancery would not, on the father's application, withdraw a child from the custody of its aunt. (*Lyons v. Blinkin*, 1 *Jacob's R.* 245.)

In one case before the assistant vice-chancellor of New York, on a bill by the mother for a separation from her husband for abandonment, and a claim for the custody of her infant children, the court considered it to be the settled English law, that the father had the right to the custody of his children, with the exception of very tender infants, unless his conduct was such as to endanger the bodily or moral welfare of them, or any of them, and that the doctrine of the common law had been weakened, though not overthrown, in the United States. (*Ahrenfeldt v. Ahrenfeldt*, 1 *Hoff. Ch. R.* 497.)

In another case in the late court of errors of New York, it was decided that the father was entitled to the custody of his minor children ; but that if the parents lived apart under a voluntary separation and the father had left the infant in the custody of the mother, that custody would not be transferred to the father on *habeas corpus* when the infant was of tender age and sickly habit, and especially if the qualifications of the mother for the case were superior. The decision of the supreme court was, that the husband had the better title and paramount right to the custody of his minor children, in the absence of any positive disqualification on his part for the discharge of his parental duties, and the alienism of the husband was not such a disqualification : and the court of errors affirmed the decision. (*Mercien v. The People*, 25 *Wend. R.* 64. *The People v. Mercien*, 3 *Hill's R.* 399. *Vide 2 Kent's Com.* 194, *note f.*)

The same rule upon the subject is recognized by the courts of England. It is there held that the father is entitled to the custody of his legitimate children, to the exclusion of their mother, though they be within the age of nurture. (*Rex v. Greenhill*, 6 *Neville & Manning's R.* 244. 4 *Adolph. & Ellis R.* 624.) And if a divorced wife should detain her infant child from the father, he may maintain proceedings to obtain its custody without any previous demand upon the mother to surrender it. (*Ex parte Wille*, 76 *Eng. C. L. R.* 680.)

§ 184. As a general thing, the custody of infants, as between the father and mother, is regulated by statute. Thus, in England, the hardships inflicted upon unoffending mothers by a state of the law which took such little account of their claims or feelings in a matter in which they are so deeply interested as the custody of their children, had long been felt and observed, until finally in 1839, a statute was passed, known by the name of Mr. Justice Talfourd's act, designed to mitigate the then existing cruelty, and which is in force at the present day.

When this bill was in the House of Lords, Lord Lyndhurst is reported to have said, that by the law of England, as it then stood, the father had an absolute right to the custody of his children, and to take them from the mother. However pure might be her conduct, however amiable, however correct in all the relations of life, the father might, if he thought proper, exclude her from all access to the children, and might do this from the most corrupt motives. He might be a man of the most profligate habits ; for the purpose

of extorting money, or in order to induce her to concede to his profligate conduct, he might exclude her from all access to their common children, and the course of the law would afford her no redress. That was the state of the law as it then existed. Need he say that it was a cruel law, that it was unnatural, that it was tyrannous, that it was unjust?

On the other side it was argued that the father was responsible for the rearing up of the child; but when unhappy differences separated the father and mother, to give the custody of the child to the father, and to allow access to it by the mother was to injure the child; for it was natural to expect that the mother would not instil into the latter any respect for the husband, whom she might hate or despise. Such a system would prevent a child from being properly brought up. The bill, however, became a law, which provides:

1. That it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland, respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the petitioner to such infant or infants, at such times, and subject to such regulations as he shall deem convenient and just; and if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the petitioner until attaining such age, subject to such regulations as he shall deem convenient and just.

2. That on all complaints made under this act it shall be lawful for the Lord Chancellor or the Master of the Rolls in England, and for the Lord Chancellor or the Master of the Rolls in Ireland, to receive affidavits sworn before any master in ordinary, or master extraordinary of the court of chancery, and that any person who shall depose falsely and corruptly in any affidavits so sworn to, shall be deemed guilty of perjury and incur the penalties thereof.

3. That all orders which shall be made by virtue of this act by the Lord Chancellor or the Master of the Rolls in England, and by the Lord Chancellor or the Master of the Rolls in Ireland, shall be enforced by process of contempt of the high court of chancery in England and Ireland respectively.

4. Provided, always, that no order shall be made by virtue of this act, whereby any mother against whom adultery shall be established by judgment, in an action for criminal conversation at the suit of her husband, or by the sentence of an ecclesiastical court, shall have the custody of any infant, or access to any infant, any thing herein contained to the contrary notwithstanding. (2 and 3 Vict. Ch. 54. *Forsyth on Inf.* 137-139.) The object of this act, as is apparent upon the face of it, is to protect mothers from the tyranny of those husbands who may ill-use them, and to allow the mother of her children to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother, and this has been the construction put upon the act. In one of the first cases brought before the court under the act, the custody of five infant children was transferred from the father to the mother, on the ground that the father had been guilty of openly immoral conduct, and was, withal, of an irreligious character, and was bringing up his children in a way calculated to demoralize them. (*Warde v. Warde*, 2 Phillim. R. 786.)

§ 185. In the State of New York, the statute provides that when a husband and wife shall live in a state of separation, without being divorced, and shall have any minor child of the marriage, on application of the wife, if she be an inhabitant of the state, the supreme court, upon *habeas corpus*, may award the charge and custody of the child to the mother, for such time, under such regulations and restrictions, and with such provisions and directions as the case may require. (2 R. S. part 2, ch. 8, tit. 2, §§ 1, 2. 2 Stat. at Large, 155.) Under this statute the supreme court of the state has declared, that the general doctrine that the right of a father to the custody of his minor children is paramount to that of the mother, is well settled; although he may forfeit that right by misconduct, or lose it by disqualification, and it may be suspended by reason of the tender age of the child and its welfare, requiring that it be with the mother. But a strong case must exist to warrant the depriving him of this right, even for a limited period; that when the wife has separated from her husband without any sufficient cause or excuse, she ought not to have the custody of her child, unless the health and present condition of the child imperatively require it. (*The People v. Humphrey*, 24 Barb. R. 521.)

Of course, proceedings by *habeas corpus*, in behalf of a wife living in a state of separation from her husband, respecting the

custody of a minor child, can be entertained only by the supreme court, not by a justice of that court, nor a county judge, though such justice or judge may entertain proceedings by *habeas corpus* in most other cases. (*The People v. Humphrey*, 24 Barb. R. 521.)

When the husband and wife live separate and apart from each other, evidence as to the causes of their separation and as to the relative merits and demerits of the parties, with a view to the exercise of a sound discretion by the court, will be received on the return of a *habeas corpus* sued out by the wife. (*The People v. Brooks*, 35 Barb. R. 85.)

There is also another provision of the New York statute, by which, in any suit brought by a married woman for a divorce, or for a separation from her husband, the court in which the same shall be pending may, during the pendency of the cause, or at its final hearing, or afterward, as occasion may require, make such order as between the parties, for the custody, care and education of the children of the marriage, as may seem necessary and proper, and may, at any time thereafter, annul, vary or modify such order. (2 R. S. part 2, ch. 8, tit. 1, § 59. 2 Stat. at Large, 154.)

Under this provision of the statute, it has been held that the award of the care and custody of the child to the mother must be presumed to carry with it the obligation to support the child, in the absence of evidence to the contrary; or at least to relieve the father from the obligation to furnish such support upon the call of the mother. The general rule, however, is recognized, that, as between the father and mother, the obligation to support the child rests primarily upon the father; and, in cases of divorce, when the custody of the child is awarded to the mother, the decree usually provides for the support of the child. (*Burritt v. Burritt*, 29 Barb. R. 124.)

§ 186. The statutes of others of the American States are similar to those of New York.

In the State of Vermont the statute provides that parents shall have the care and custody of their minor children while living and cohabiting; but if the parents live separate and apart from each other, the supreme court may order and decree in regard to the care and custody of their minor children. And the same power is given when a divorce is decreed. (R. S. of 1863, ch. 70, §§ 31, 46.)

In the State of Massachusetts, the father, if living, may have the custody of his minor children; and if not living, then the

custody is with the mother. (*Gen. Stat. ch. 109, § 4.*) It seems, however, that the father may appoint a guardian for his infant children by will. (*Ib. § 5.*) In case the father and mother live separate and apart from each other, unless there is some good and justifiable cause of separation, the court will not sanction such unauthorized separation by ordering their infant children into the custody of the mother. If there be any good cause of divorce, either *a vinculo* or *a mensa*, and proceedings are instituted, the court will then take such order as to the custody both of the wife and children as the circumstances of the case may require; and in all cases the proceedings are governed by the judicial discretion of the court, in directing which all the circumstances are to be taken into consideration. In the case of a child of tender years, the good of the child is to be regarded as the prominent consideration; and generally the same rule in such cases is the same in Massachusetts as in New York. (*The Commonwealth v. Briggs, 16 Pick. R. 203.*)

In the State of Rhode Island, a father may appoint a guardian for his infant child by will. (*R. S. of 1857, ch. 138, § 1.*) But after a divorce, or where the wife lives separate from her husband, the custody of her children is given to the mother. (*Ib. ch. 135, §§ 1, 2.*) In cases of application of divorce, jurisdiction in regard to the custody of the minor children is vested in the supreme court. (*Ib. ch. 137, § 12.*)

In the State of Virginia, in case the parents are divorced, the court is vested with the power to order in regard to the custody and maintenance of their infant children. (*Code of 1849, ch. 109, § 12.*)

In the State of North Carolina, the father may dispose of the custody and tuition of his infant children by will; but in case the parents are divorced, the court may commit the custody of the children to either the father or the mother. (*Rev. Code, ch. 54, §§ 1, 4.*)

In Tennessee, where the wife is abandoned by her husband, she may be appointed guardian of her infant children by the county court or the court of chancery, and she will then be entitled to their custody. The county court may take cognizance of all matters relating to minors. (*Code of 1858, §§ 2490, 2493.*)

In Texas, if the father is dead, the mother may be appointed the guardian of her infant children, and their custody will be com-

mitted to her. In cases of separation between husband and wife, the district court may give the custody of the children to either father or mother. (*Oldham & White's Dig.* p. 228, art. 951.)

In the State of Indiana, the custody of the infant children is given by statute to the father, and if the father is dead, then to the mother, provided always that the parents are suitable persons to exercise the trust. (2 *R. S. of 1862*, ch. 4.)

In the State of Nebraska, the father, if living, is entitled to the custody of his infant children; if the father is dead, then the custody of the children is committed by statute to the mother. (*R. S. ch. 22*, § 6.)

§ 187. There is a considerable degree of uniformity in the laws of the several states with respect to the custody of infants, and the spirit of the adjudged cases upon the subject, both in England and in this country, is essentially the same. As a general rule, the father is entitled to the custody of his minor children, and in case of his death, the custody will be given to the mother. There are, of course, exceptions to the rule, when the matter has to be determined by a judicial tribunal; and in such cases, the courts are not usually bound to deliver the child into the custody of any claimant, but will exercise a sound discretion in the matter, and leave the child in such custody as may appear best for the child. In cases of controversy between parents for the custody of their minor children, the right of the father is preferred to that of the mother, but the welfare of the child will be the criterion by which the custody is awarded. If the child has arrived at the age of discretion, in ordinary cases upon *habeas corpus*, the court will permit the child to elect in whose custody it will be placed, although the court will always take care that the custody is not an improper one. If the child is not competent to form a judgment and declare his election, the court, after examination, will exercise its judgment for him. (*Matter of Woolstoncraft*, 4 *Johns. Ch. R.* 80. *Matter of Waldron*, 13 *Johns. R.* 418. *People v. Chegaray*, 18 *Wend. R.* 637. *People v. Kling*, 6 *Barb. R.* 366. *Foster v. Alston*, 6 *How. [Miss.] R.* 406. *Commonwealth v. Addicks*, 5 *Bin. [Pa.] R.* 520. *Ex parte Crouse*, 4 *Whart. R.* 9. *United States v. Green*, 3 *Mason's R.* 482. *Willesby v. Duke of Beauford*, 2 *Russ. R.* 1. *The State v. Smith*, 6 *Greenleaf's R.* 262. *People v. Mercein*, 3 *Hill's [N. Y.] R.* 399. *Rex v. Greenhill*, 6 *Nev. & Man. R.* 244.)

The mode in which courts of common law interfere in questions relating to the custody of infants is by writ of *habeas corpus*, which "in general, lies to bring up persons who are in custody, and who are alleged not to be legally restrained of their liberty. When the court clearly perceives that they are illegally detained, it will discharge them." (*Ex parte Glover*, 4 Dowl. P. C. 293. *People v. Rose Porter*, 1 Duer's R. 709.) On the statutory *habeas corpus*, the officer cannot interfere with the legal custody, and must dismiss the writ if it appear that the infant, being too young to choose, is in the keeping of its general guardian. On the common law writ, issued from the supreme court, and on a petition to the supreme court in equity, the interest of the infant will be considered, and the custody given accordingly. (*People v. Wilcox*, 22 Barb. R. 178. *Wilcox v. Wilcox*, 14 N. Y. R. 575.)

The distinction between the powers of a court of common law and those of a court of equity in this matter, stated in a few words, is this: the care of the person of the infant to protect it from violence belongs to a court of common law, but the care and protection of the infant for the purpose of education belongs to a court of equity. (*Wellesby v. Wellesby*, 2 Bligh's N. S. R. 136. *Ex parte Skinner*, 9 Moore's R. 278. And vide *Crowley's case*, 2 Swanst. R. 1.)

In the State of New York, the supreme court is the only tribunal which has jurisdiction to entertain the application of a married woman, living apart from her husband without a divorce, for a *habeas corpus* to have their infant child brought up and its custody awarded to her. (*People v. Humphreys*, 24 Barb. R. 521.) It seems, however, that this power will not be exercised by the court to give the custody of the child to the mother, in cases of separation of husband and wife, produced by the wife, of her own accord, without justifiable cause, withdrawing herself from the protection of her husband, but only when the separation is in pursuance of a judicial decree or by mutual consent. (*Nickerson, relator*, 19 Wend. R. 16.) When a child of tender years is brought before the court upon *habeas corpus*, and the parents, disputing for its custody, are living separate, a summary inquiry into their respective conduct and situation may be necessary. But if the child is of very tender years, and there are no strong reasons for rejecting the mother's claim, the court will not take it from her. (*People v. Mercien*, 8 Paige's R. 47.)

It has been said that a court of common law is "not bound to deliver an infant over to any body, nor to give it any privilege;" but, according to a comparatively recent English decision, this doctrine is not quite correct. When a clear right appears, the court feels itself imperatively called upon to enforce that right, and deliver up the infant to the proper and legal custody. (*Rex v. Isley*, 5 *Ad. & Ell. R.* 441.) And such court will also, like a court of equity, protect infants against moral contamination, arising from a vicious connection formed by either parent, limiting itself, however, to a case where the connection is kept up in the presence of the child. Such is the spirit of all the leading adjudged cases. "The welfare of the infant is the polar star by which the discretion of the court is to be guided. But the legal rights of the parent or guardian are to be respected. They are founded in nature and wisdom, and are essential to the peace, order, virtue and happiness of society. But they may have been abandoned, transferred or abused." (*Hurd on Habeas Corpus*, 528.)

It frequently happens that the father of an infant, upon the death of its mother, or other event, makes an arrangement by which he gives his child to a third person, or relinquishes his custody to it until it is of age, upon consideration that the party agrees to adopt the child and care for it as his own; and then, after the affections of both child and adopted parent become engaged, and a state of things has arisen which cannot be altered without risking the happiness of his child, will attempt to reclaim the custody of the child. In such a case but few rules are found for the government of the courts; and there are decisions both in England and this country, to the effect that the father would not be bound by such a transaction, and could recover the custody of the child, even though the interests of the child had been promoted by the original transfer. But the better opinion is that the father in such a case is not in a position to require the interference of the court, in favor of a controlling legal right on his part, against the rights, such as they are, the feelings and the interest of the other parties. (*Vide Pool v. Gott*, 14 *Law Rep.* 269. *The State v. Smith*, 6 *Greenl. R.* 462. *McDowle's case*, 8 *Johns. R.* 328. *The Commonwealth v. Gilkeson*, *Wallace's [Philadelphia] R.* 194. *Contra, In re Bircham*, 16 *Eng. L. and Eq. R.* 221. *The State v. Clover*, 1 *Harr. [Del.] R.* 419. *Mayne v. Bredwin*, 1 *Halstead's [N. J.] Ch. R.* 454.)

Upon this subject, Mr. Hurd says: "It has been seen that a parent may emancipate his minor child by voluntarily relinquishing his claim to the services of the child, or by permitting the child to contract marriage or other relations inconsistent with filial subjection, and may also forfeit his right to custody by cruelty or gross neglect of duty.

"Why, then, may he not transfer to another this right of custody which he may thus abandon or forfeit, especially where the interests of the child are not prejudiced by the assignment? And how can the court pronounce that custody, which is held under a fair agreement with the parent, and not injurious to the welfare of the child, to be an *illegal restraint*?"

"It is true of this, as of many other questions in *habeas corpus* proceedings, that the authorities do not all speak one opinion." (*Hurd on Habeas Corpus*, 537.)

§ 188. In the case of illegitimate children, the English decisions are not entirely unanimous with respect to their legal custody while infants. On one occasion, Willes, Ch. J., said he would "give no opinion whether the father has any power over a child who is *nullius filius*. Grotius says truly, that the mother is the only certain parent; and an order of justices to remove the mother always removes the child." (*Holland v. Malkin*, 2 Wils. R. 126.)

In another case, Lord Kenyon, Ch. J., said, that the putative father of a bastard child had no right to the custody of it. (*Rev. v. Soper*, 5 Term R. 278.)

In still another case, the court of common pleas took away an infant illegitimate child from the custody in which it had been placed by its father, although there was no imputation against him, and ordered the child to be delivered to the mother, who was anxious to have it. Sir J. Mansfield, Ch. J., said: "It is not unlikely, indeed, that by granting this application, we may be doing a great prejudice to the child, but still the mother is entitled to the child if she insists upon it." (*Ex parte Knee*, 1 Bos. & Pull. N. R. 148.) In other cases, however, the English courts seem to recognize the right of a putative father of an infant bastard child to insist upon having his child given up to him for the purpose of maintaining it. (*Vide Forsyth on Inf.* 81-86.)

But the rule in these cases of illegitimate children is well settled by the courts in this country. The American courts uniformly

hold that the putative father has no right to the custody of the child, as against its mother, and against its consent. The mother, here, is entitled to the custody of her bastard child; and if the putative father wrongfully and fraudulently obtains possession of the child, and retains such possession until compelled to relinquish it by the court on *habeas corpus*, an action for false imprisonment will lie against him in the name of the child. (*Rosalina v. Armstrong*, 15 Barb. R. 247.) But if it appears that the child is abused, the court will interfere in its behalf, and direct it to be placed elsewhere than with the mother, even, who has it in custody, and in all such cases the court will exercise a sound discretion with respect to the custody of the child. The mother is the natural guardian of the child; is bound to maintain it, and ordinarily is entitled to the control of it; and when the courts interfere, if the child is too young to determine for itself, the court or officer assumes to determine for it where it shall go, and, in doing so, the welfare of the child is chiefly, if not exclusively, to be had in view. This is the plain doctrine of the courts in the State of New York, and the rule is the same in Massachusetts by express adjudication, and is probably recognized in all of the states. (*The People v. Kling*, 6 Barb. R. 366. *Same v. Landt*, 2 Johns. R. 375. *Carpenter v. Whitman*, 15 *ib.* 208. *Wright v. Wright*, 2 Mass. R. 109. *Commonwealth v. Fee*, 6 Serg. & Rawle's R. 255.)

The common law never gave to the putative father of an illegitimate child any right to its custody, and in general no statute exists securing to him such right. (*The People v. Mitchell*, 44 Barb. R. 245.)

On the marriage of the mother, the natural guardianship of an illegitimate child devolves on the husband, and then the husband is entitled to the custody. (*Wright v. Wright*, *supra*.) But this relation between the husband and child ceases on the dissolution of the marriage by divorce, and the mother's rights and liabilities then revive. (*Wright v. Wright*, *supra*.)

The putative father, however, is generally entitled to the custody of the child as against all but the mother or her husband; and if she be dead, and the father a suitable person, the child will be taken from the maternal grandmother and delivered to him; and if the child be unlawfully taken from him by a stranger, he seems to be entitled to process to regain the custody. (*Wright v. Wright*, *supra*, and *Commonwealth v. Anderson*, 1 Ashm. [Pa.] R. 55.)

But "the paternal and filial relation, in all its endearing and legal consequences, does not exist between such a father and such a child. The law looks coldly upon this relation, and takes no further care of it than to see that the community is not put to expense. In such a case there seems to be more than a legal doubt who is actually the father, the sworn father being termed merely the *putative* father, while there can be no doubt who is the mother. As the mother is the only parent such a child can have with legal certainty, she is the parent to whom the custody of such a child seems properly to belong." (*Matter of Doyle, Clark's* [N. Y.] *Ch. R.* 154.) Of course, when the bastard is brought before the court on *habeas corpus*, he has the same liberty of election as to whom he will go, under the same circumstances, and in the same cases, as children born in lawful wedlock.

§ 189. The testamentary or general guardian of the person of an infant is entitled to its custody. The very nature of guardianship, and the relation of guardian and ward, gives the guardian this right. The guardian is placed *in loco parentis*, and as the father is entitled to the custody of his child, so is the guardian of that of his ward; and he may have the writ of *habeas corpus* to bring up the person of his ward, under the same circumstances as the father for his child, and courts will be governed by the same principles in determining the question of custody. (*Vide Commonwealth v. Hammond*, 10 *Pick. [Mass.] R.* 274. *The State v. Cheeseman*, 2 *South. [N. J.] R.* 445. *Rex v. Isley*, 31 *Eng. C. L. R.* 682.) The rights of a testamentary guardian, especially, are always regarded as paramount to those of any one else, the mother, even, having no right to interfere with the discretion of the guardian in respect to the custody and education of his ward.

On a comparatively late occasion, in the English court of chancery, the law with regard to the conflicting claims of a testamentary guardian and a mother was explicitly laid down by Lord Chancellor Cottenham, who said: "It is proper that mothers of children thus circumstanced should know that they have no right, as such, to interfere with testamentary guardians, and if, under the peculiar circumstances, I think it proper now to leave the child in the custody of the mother, it is not in respect of right in that mother, but it is in consequence of that power which the court has of controlling the power of testamentary guardians." (*Talbot v. Earl of Shrewsbury*, 4 *Myl. & Cr. R.* 683.) This doctrine seems

cruel and harsh in the abstract, but the courts have laid down some wise and humane rules to be observed by the guardian, in respecting the wishes of the mother in the execution of his important and responsible office. As an example, Lord Eldon, in a case before him, said: "In this case, I need not add, that, though the effect of the appointment of a guardian is to commit the custody of the guardianship, this court looks, with great anxiety, to the execution of the duty belonging to the guardian, and the attention expected to be paid to the reasonable wishes of the natural parent. Though it is not necessary in this instance, upon such a contest, it is important to observe that it can never end happily but by implanting in the hearts of the children filial and dutiful feelings toward the parent, the best and most important duty imposed upon the guardian by the deceased parent." (*Ex parte Earl of Ilchester*, 7 Vesey's R. 381.)

With respect to guardians appointed by the court, it would seem that the same rule will apply in regard to the custody of the ward, and the interference of the court in relation to it, as to that in case of testamentary guardians. (*In re Spence*, 3 Phil. R. 247.)

The right of a testamentary guardian, however, to the care and custody of his ward, cannot be superseded by the surrogate or probate court, by a new appointment. (*The People v. Kearney*, 31 Barb. R. 430.)

The right to the guardianship of an infant cannot be tried upon a *habeas corpus*, and the court of chancery or other court having equity powers, will exercise its discretion in disposing of the custody of the infant, upon the same principles which regulate the exercise of a similar discretion by other courts and officers who are authorized to allow the writ in similar cases. (*The People v. Mercein*, 9 Paige's R. 47.)

The principle of *res adjudicata* is applicable to proceedings upon *habeas corpus* to obtain the custody of infant children; and it makes no difference that one writ was made returnable before a judge at chambers, and the other before a court of record. The decision, however, is an estoppel only so far as to determine the rights of the parties at the time of the proceeding. (*Mercein v. People*, 25 Wend. R. 64. *People v. Mercein*, 3 Hill's [N. Y.] R. 399.)

Such are the leading principles relating to the custody of infants as settled by statute and the adjudication of courts; and they are

sufficiently clear and explicit to meet every conceivable case. All orders made by any court or judicial officer in relation to the custody of an infant, may be enforced by attachment as for a contempt.

CHAPTER XVII.

MAINTENANCE OF INFANTS—WHEN IT IS ALLOWED, UPON WHAT PRINCIPLE, AND FROM WHAT FUNDS—SALE OF THE REAL ESTATE OF INFANTS—THE PROCEEDINGS, AND DISPOSITION OF THE PROCEEDS—SPECIFIC PERFORMANCE OF THE CONTRACT OF THE ANCESTOR—CONVEYANCE BY AN INFANT TRUSTEE.

§ 190. THE question of the maintenance and support of the infant is not always free from difficulty and doubt, and yet certain principles and rules, upon the subject, are quite well established by the adjudicated cases and statutes.

When an infant has property of his own, and his father is dead or not able to support him, he may be maintained out of the income of his property, if his interest in it be absolute, by the person in whose hands the property is, or a stranger may maintain him, and a court of equity will allow all payments made for this purpose, which can be shown to have been proper and reasonable. It is usual to insert in wills and settlements by which property is given to infants, directing the application of the income of the fund, for their maintenance and education, and sometimes, of the capital, or parts of it, for their advancement, while their interest in the fund is not absolutely vested, and in these cases the directions should be implicitly followed, unless a discretion is given, and then the courts will never interfere, unless the trustees are making a fraudulent or mischievous use of it. But whether the infant is entitled under the instrument or not, trustees and guardians may relieve themselves of all responsibility by obtaining the previous sanction of the court for the payments which they propose to make. (*McPherson on Inf.* 213.)

A guardian may apply the infant's income to his maintenance, but he does so at his peril, and it is advisable, therefore, to secure the sanction of the court. (*Ex parte Whitefield*, 2 *Atk. R.* 315.) Courts of equity have a common jurisdiction on the subject of

maintenance, besides they have not unfrequently a special jurisdiction under certain statutes, which they exercise on the same principles by which they are guided in ordinary cases. For instance, in England they have a statute which makes it lawful for the court of chancery, or the court of exchequer, to direct, by order, the dividends due, or to become due, in respect of certain stocks standing in the name of an infant, to be paid to the guardian of such infant, or to any other person, according to the discretion of the court, for the maintenance and education, or otherwise, for the benefit of such infants. (1 *Wm. IV*, *ch.* 65.) So, also, by the statutes of the State of New York, it is provided that whenever it shall satisfactorily appear to the supreme court, or to the county court of the proper county, that a disposition of any part of the real estate of an infant is necessary and proper for the maintenance and support of the infant, the court may order the sale or other disposition of such real estate; and from the time of the application to the court for such sale, the infant is considered a ward of the court so far as relates to such property, its proceeds and income, and the court is required to make order for the application and disposition of the same. (2 *R. S.* *part* 3, *tit.* 2, *art.* 7. 2 *Stat. at Large*, 202, 213. *Code of Procedure*, § 30, *sub.* 6. *Laws of 1847*, *ch.* 280, § 16. *Code of Procedure*, § 10.) Other states have similar provisions.

§ 191. Generally speaking, the father is bound to maintain his infant child, and no allowance will be made to him for this purpose out of his property. But if the father is not able to maintain his children, the court will order maintenance for them out of their own property; and this does not turn upon the question of the father's solvency merely, but whenever he is not in such circumstances as to be able to give the child an education suited to the fortune which he enjoys or expects. (*McPherson on Inf.* 220. *Buckworth v. Buckworth*, 1 *Cox's R.* 80.)

Where the father's circumstances are such as to make it reasonable to allow maintenance for the children, and it is for their benefit to allow it, and their fortune is of such a nature that maintenance may properly be given out of it, maintenance will be ordered, although the instrument under which the property is held contains no direction for maintenance, or even directs the income to be accumulated. (*McPherson on Inf.* 223.) But if the father is living, and of sufficient ability to support and educate his child,

the interest of the child's property cannot be applied for that purpose, even though there be a direction in the instrument under which the property is held that such interest shall be so applied, for the reason that such direction is construed to mean that maintenance shall be allowed out of the fund, if no maintenance is due by law, but not otherwise; and the court will order the fund to be accumulated till the child attains majority. (*Andrews v. Partington*, 3 Bro. Ch. Cas. 60. 2 Cox's R. 223. *Mundy v. Earl Howe*, 4 Bro. Ch. Cas. 224.)

After the father's death, maintenance will be allowed, without regard to the ability of the mother. (*Landy v. Duchess of Athol*, 2 Atk. R. 447. *Ex parte Lord Petre*, 7 Ves. R. 403. *Brasby v. Magrath*, 2 Sch. & Lef. R. 35.) Where there are equal legacies to a class of children not otherwise provided for, and for whom it would be beneficial that maintenance should be allowed, the court if it can collect before it all the persons who may be entitled to the fund, so as to make each a compensation by the immediate maintenance given, for the diminution of the fund to which he may eventually become entitled, will maintain them all out of the interest. (*Ex parte Kebble*, 11 Ves. R. 606. *Errat v. Barlow*, 14 ib. 204.) But when the legacy is not given absolutely to the children and the survivor, but there is a gift over to a stranger, this principle cannot be applied without the consent of the stranger. (*Ex parte Kebble*, *supra*.) The decisions are not uniform in the case where the class of persons beneficially interested is not wholly before the court, as when children unborn may form a part of the same class, although the weight of authority seems to be adverse to the allowance of maintenance in such a case. (*McPherson on Inf.* 232, 233, and authorities cited.)

When a bequest is made to a child, payable at a future day, or for the payment of which no time is specified, and the child has no other provision, the court will allow interest on the fund, by way of maintenance, from the death of the parent. (*McPherson on Inf.* 234-237.) But though interest is thus given by way of maintenance, the infant has no claim to any interest beyond what the court thinks sufficient for his maintenance. (*Ib.* 237.) When a legacy is given which would not, abstracted from the rule in favor of children, carry interest, and an annual sum less than the interest is given for maintenance, the child can have no more, however small the maintenance may be, and however large the legacy; for the giving

an express sum for maintenance bars the presumption that an indefinite maintenance was intended. (*Ib.* 238-241.) This shows, after all, that the matter depends almost altogether, if not wholly, upon the intent of the instrument under which the fund may be held. Where a present absolute interest in a fund is given, the court will allow maintenance in the absence of any direction to that effect, and even in disregard of a direction for accumulation; and if an insufficient sum is given for maintenance, the court will excuse it. It will, in like manner, grant an increase of an insufficient maintenance given by will, whenever maintenance is allowable upon the principle of compensation, for the principle is wholly unconnected with any supposed intention of the donor. (*Ib.* 241, 242.) And maintenance will be allowed out of the interest of a legacy where there is a fair inference from the whole of the will, that the testator intended it. (*Ib.*) When a fund is expressly given to a father for the maintenance of his child, this amounts to a legacy to the father, and of course he is at liberty to appropriate it to the use originally intended by the giver. (*Andrews v. Partington*, 2 *Cox's R.* 223. *Robinson v. Tickell*, 8 *Ves. R.* 142. *Brown v. Casamajor*, 4 *ib.* 498.) It was formerly held that a parent ought not to be allowed to determine for himself the question of his ability to maintain his infant children, and that the father would never be allowed for any thing paid without the authority of the court. (*Hughes v. Hughes*, 1 *Bro. Ch. Cases*, 387. *Hill v. Chapman*, 2 *ib.* 231.) But as the precedents now stand, the court must look at each case with the view to make such order as the rule prescribed by the giver justifies, and the conduct of the parties allows. (*Maberly v. Tuston*, 14 *Ves. R.* 499. *Ex parte Darlington*, 1 *Ball & Beat. R.* 240.) As an illustration; when the father of an infant son, having a large estate in England, resided in India and there maintained his son, and incurred a large debt for the purpose, and was unable longer to maintain him, the court held, that the father having lived out of the country, and being unable to apply to the court before, was a special circumstance which would enable the court to grant the sum required for past maintenance from the infant's estate. (*Carmichael v. Hughes*, 6 *Eng. L. and Eq. R.* 71.) If a guardian thinks proper to allow the infant more than the maintenance settled by the court, the court will make a reference as to such extra expenditure, but only under special circumstances. (*Rainsford v. Freeman*, 1 *Cox's R.* 417.)

It seems that a liberal allowance will be made for the maintenance of an infant, with a view to the circumstances of his family. For instance, if he is the oldest, and has considerable property, while the others have little or none, the court will give them maintenance, or a part of maintenance, out of his provision, as a part of the maintenance made for him, though to be applied to them, looking upon him as the head of the family, and considering it to be for his benefit, not that this portion of his fortune should be saved, but that by means of it his brothers and sisters should be honorably brought up. And the narrow circumstances of a father, or of a mother, or both, have also been considered in fixing the infant's allowance for maintenance. (*Vide Pierpoint v. Lord Cheney*, 1 P. Wms. R. 493. *Harvey v. Harvey*, 2 ib. 22. *Lanoy v. Duke of Athol*, 2 Atk. R. 447. *Petre v. Petre*, 3 ib. 511. *Ex parte Petre*, 7 Ves. R. 403. *Tweddell v. Tweddell*, Turn. & Russ. R. 13. *Hill v. Chapman*, 2 Bro. Ch. Cas. 231. *Allen v. Coster*, 1 Beav. R. 202.)

As a general rule, the principal must not be broken in upon for the maintenance of the infant, but the courts will not scruple to do so, even of a legacy not vested, when the legacy is so small that the interest will not suffice to give the infant legatee a competent maintenance and education, or when it will be clearly for his benefit that a sum of money should be raised for that purpose. (*Ex parte Green*, 1 Jac. & Walk. R. 253. *Ex parte Swift*, 1 Ryan & Moody's R. 575. *Harvey v. Harvey*, 2 P. Wms. R. 23. *In re England*, 1 Russ. & Mylne's R. 499. *Clay v. Pennington*, 8 Sim. R. 359.) Guardians and trustees, however, are not usually permitted, of their own authority, to break in upon the capital of sums belonging to an infant, although, if the act appears to the court, on inquiry, to be such as the court would have ordered to be done, the expenditure will be protected by the court. (*Carmichael v. Wilson*, 3 Moll. R. 84, 88. *Walker v. Wetherell*, 6 Ves. R. 474.)

It is a general principle, that acts done by a guardian without authority will be protected, and will bind the infant, if they turn out eventually beneficial to the latter; but the guardian does such acts at his own risk. (*Vide Earl of Chesterfield v. Cromwell*, 1 Eq. Ab. R. 287. *Smith v. Low*, 1 Atk. R. 489.)

As a question of practice, it seems that in an administration suit an inquiry as to the propriety of maintenance to an infant may be

directed by the decree at the hearing of the case. (*Cross v. Beavan*, 5 *Eng. L. and Eq. R.* 129.) And further, that the court may direct a referee to appoint a guardian to an infant, and approve of proper maintenance, to be inserted in the decree upon the hearing of a suit, without any petition for that purpose being presented. (*Cross v. Brown*, 7 *Eng. L. and Eq. R.* 58.) And, generally, in ordinary cases, when the estate is not large, the court, upon petition, will settle a due maintenance upon the infants. (*Ex parte Whitfield*, 2 *Atk. R.* 316. *Ex parte Thomas*, *Ambler's R.* 146. *Ex parte Kent*, 3 *Bro. Ch. R.* 88. *Ex parte Salter*, 2 *Dick. R.* 769. *Ex parte Starkie*, 3 *Sim. R.* 339. *Clay v. Pennington*, 8 *ib.* 359.) In regard to this practice, Lord Hardwicke said: "There may be a great convenience in applications of this kind, because it may be a sort of check upon infants with regard to their behavior; and it may be an inducement to persons of worth to accept of the guardianship, when they have the sanction of this court for any thing they do on account of maintenance; and, likewise, of use, in saving the expense of a suit to an infant's estate." (*Ex parte Whitfield*, *supra*.)

Such are the rules respecting the maintenance of infants recognized generally by the English courts, and the same principles are usually accepted by the American courts.

§ 192. Some of the adjudged cases in our own country upon the subject of the support and maintenance of infants, will now be briefly referred to; and sufficient to put the reflecting student in possession of all that is necessary upon the subject.

In this country, maintenance will be allowed out of the capital of the infant's estate, when the principal is small; otherwise it must be out of the interest (*Matter of Bostwick*, 4 *Johns. R.* 100), thus following the rule laid down in England.

Where an estate is given absolutely to a class of infants with benefit of survivorship, maintenance out of the fund may be allowed to them; but maintenance cannot be allowed to an infant out of a fund which belongs contingently to others. (*Matter of Davison*, 6 *Paige's R.* 136.)

Where an estate is devised to an infant, with a limitation over, in case he should die without issue before arriving at the age of twenty-one, the general guardian can, at most, only require of the executor the income for the infant's maintenance and support. (*Bradley v. Amidon*, 10 *Paige's Ch. R.* 235.)

Where the income is devised to a female for life, and the principal, upon her death, to her children surviving her, and the issue of such as have died, maintenance cannot be ordered out of the principal, though the mother consent; for the reason that until the mother's death, it is utterly uncertain who will be entitled to the principal. (*Matter of Ryder*, 11 *Paige's Ch. R.* 185.)

The court will not allow maintenance on behalf of an infant, out of her property, where there is any other sufficient provision or a right to maintenance which can be enforced. It will be refused to the father, where he is of sufficient ability to maintain and bring up his child without it, having reference to her situation and prospects in life, with a due regard to the claims of others upon his bounty. (*Matter of Kane*, 2 *Barb. Ch. R.* 375.) But where the children were wealthy, and their father in moderate circumstances, and barely sufficient for the reasonable maintenance of the residue of his family, the court, deeming it promotive of the welfare of the children that they should live with their parents, ordered the father a much larger allowance for their education and support in his family, including compensation as guardian, than would have been necessary if they were maintained at a boarding-school. (*Matter of Burke*, 4 *Sandford's Ch. R.* 617.) It will be recollected that this is in accordance with the English practice in such cases.

Another rule recognized by the courts of this country, which is precisely the same as that in England upon the subject, is that where there is any valid limitation over, however contingent, maintenance cannot be allowed, unless provided for in the grant or will. Where the fund is given absolutely to a class of infants, with the right of survivorship—that is, where all have an equal chance of surviving, and a present interest—an allowance may be made. If those not *in esse* may take, as if to children born and hereafter to be born, or to children; and in case of death of any before twenty-one, to the issue of the latter, or limited over to strangers, maintenance will be denied. (*Matter of Turner*, 10 *Barb. R.* 552, 557.)

It is the primary duty of the general guardian of an infant to provide for its support, maintenance and education. He stands *in loco parentis* to his ward, and must therefore provide for him and direct his education. (*Clark v. Montgomery*, 23 *Barb. R.* 464, 472.)

It will be observed that the foregoing are confined to cases decided in the courts of New York, but the principles are applicable in all of the states.

In the State of South Carolina, where it appeared that the parents of infants were unable to maintain them, the court ordered them to be maintained out of their own property. (*Cudworth v. Thompson*, 3 *Dessau. R.* 258.) But a guardian is not authorized to break in upon the capital of his ward for his maintenance, except under peculiar circumstances; should he advance beyond the income, as a general rule, he will not be allowed interest on a balance due for maintenance. (*McDowell v. Caldwell*, 2 *McCord's Ch. R.* 58. *Teagne v. Dendy*, *Ib.* 211. *Sweet v. Sweet*, *Speer's Eq. R.* 309.)

A mother who has only a bare competence for herself, and has minor children living with her, who are entitled to large estates, must have an allowance made her by the executor, out of their estates, for the maintenance and education of her daughter, and for the maintenance of her sons. (*Haywood v. Cuthbert*, 4 *Dessau. R.* 445.)

In the State of North Carolina, it has been decided that, as a general rule, a court of equity will not go beyond the income of a ward's estate for his maintenance and education, but that the court will apply a part of the capital for putting him out in life, and that, even for maintenance, as a matter of necessity, the capital may be applied when, from the possession of property, the infant cannot be entitled to maintenance as a pauper, and from mental imbecility, or want of bodily health or strength, he cannot be maintained from the profits of his property, nor put out apprentice and maintained by his master; that equity has the power, though it may seldom be willing to exercise it, to take the capital of the ward and apply it for maintenance, either future or past; and that, in ordinary cases, the court would not relieve a guardian who, without its previous sanction, had made expenditures for the maintenance and education of his ward, beyond the income of the estate, though he might have acted from the best of motives; but that the court will reimburse the guardian out of the estate of the ward, when the expenditures were demanded by such circumstances, amounting, indeed, to physical necessity, as would have compelled any court to authorize them without a moment's hesitation. (*Long v. Norcom*, 2 *Iredell's Eq. R.* 354.)

From the authorities cited, it will be seen that there is a uniformity of doctrine running through all the decisions in this country upon the subject; and upon examination of the cases, it will be found that the English authorities are often referred to and recognized as binding authority here.

§ 193. With reference to the real estate of an infant, it may be said that neither a court of law nor of equity has any inherent original jurisdiction to direct the sale of it. Lord Chancellor Hart said, in a recent case, "I have no authority to bind an infant's legal real estate. That was decided, long ago, by Lord Hardwicke, in *Taylor v. Phillips*. The chancellor has never since attempted to deal with the legal inheritance of infants without the aid of parliament." (*Russel v. Russel*, 1 *Molloy's R.* 525.) The jurisdiction, therefore, in cases of this kind, rests altogether upon the statute. Independently of an authority derived from the legislature, the court has no right to entertain the question or direct a sale. (*Garnstone v. Gavant*, 1 *Collyer's R.* 577. *Rogens v. Dill*, 6 *Hill's [N. Y.] R.* 415, 417. *Onderdonk v. Mott*, 34 *Barb. R.* 106.) By reason of this rule, statutes exist, both in England and in all of the American States, conferring jurisdiction upon the courts to order the sale and conveyance of an infant's real estate in the cases specially provided for. Thus, in the State of New York, it is declared by statute that any infant seised of any real estate, or entitled to any term of years in any lands, may, by his next friend, or by his guardian, apply to the supreme court, or the county court of the county within which the real estate is situated, for the sale or disposition of his property in the manner directed by such statute. And whenever it shall appear satisfactorily that a disposition of any part of the real estate of such infant, or of his interest in any term for years, is necessary and proper, either for the support and maintenance of such infant, or for his education, or that the interest of such infant requires or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting for a term of years, the sale or other disposition of such real estate or interest to be made by a guardian or guardians appointed by such court, in such manner, and with such restrictions, as shall be deemed expedient, though no real estate or term for years can be sold or disposed of

in any manner against the provisions of any last will, or of any conveyance, by which such estate or term was devised or granted to such infant. (2 *R. S. part 3, ch. 1, tit. 2*, §§ 170, 175, 176. 2 *Stat. at Large*, 202, 203. *Code of Procedure*, §§ 10, 30, *sub. 6. Laws of 1847, ch. 280, § 16.*)

If the lands proposed to be sold are situated in the city of New York, the application for the sale may be made to the court of common pleas of the city and county of New York; or if such premises are situated within the limits of the city of Buffalo, the application may be made to the superior court of that city. (*Laws of 1854, ch. 96, § 9, and ch. 198, § 6.*) Similar provisions are contained in the statutes of all of the states, some providing that the estates of infants may be sold or mortgaged by certain specified courts, as for instance in Pennsylvania, by the orphan's court, for the education and support of such infants, or for the payment of their debts, or when the property is going to decay or running down; in others, as in the new State of West Virginia, where it is provided that the estate of a minor may be sold when his guardian shall think his interest will be promoted thereby, by an application by the guardian, by petition to the circuit court of the county in which the estate proposed to be sold, or some part thereof, may be, stating plainly the situation, etc., of the estate, and the facts showing the propriety of the sale. At the sale the guardian nor guardian *ad litem* can be a purchaser. A conveyance may be ordered by the court to be executed by the guardian. No sale can be made against the provisions of any will or conveyance by which the estate was devised or granted to the minor. (*Laws of 1865, ch. 38.*) And in others, as in several of the western states, the estates of infants may be sold for the same purposes and in the same manner as is provided in the State of New York; but the plan of this work admits of only a statement of some general principles governing such transactions, and does not require the production of the laws of all the states upon the subject.

§ 194. Under the statutes of the State of New York, it has been held that it is a sufficient ground to authorize a sale of an infant's real estate that it is held in common with adults, and that the value of the property is small in comparison with the expense of a partition suit, to which it must otherwise be subjected. (*Matter of Congdon*, 2 *Paige's R.* 566.) So, when the situation of the infant, as regards maintenance and education, or other peculiar circum-

stances, calls for the special interposition of the court, or that the property is exposed to waste and dilapidation, or that it is a village lot which is wholly unproductive, will be sufficient grounds for the exercise of the power of the court to authorize a sale. (*Matter of Mason, Hop. Ch. R.* 122.)

To authorize the court to direct a sale of the infant's land, the infant must be *seised* of the property. An infant's vested remainder in fee, however, may be sold by order of the court for his benefit; but whether, if it be subject to open and let in afterborn children, such children will be affected by the sale, is a question not definitely settled. (*Baker v. Lorillard*, 4 *N. Y. R.* 257, 266, 267.) But it is not the practice of the court to authorize the sale of a future interest in real estate belonging to infants, except under very special circumstances; and it is never done for the mere purpose of increasing the income of the adult owner of a present interest in the estate. (*Matter of Jones*, 2 *Barb. Ch. R.* 22.)

When land belonging to four infants was sold under an order recognizing an absolute fee in an undivided fourth part as residing in each, and, on the foreclosure of the mortgage taken by the clerk for the purchase-money, it turned out that each had a vested fee, determinable, however, upon his dying without issue at the time of his death, whereupon his estate would vest in the survivors, and that one had so died since the sale, the court held, that though the sale might be conclusive as to the purchaser's title, it would protect him by retaining the proceeds of such share until proper releases were executed to him, and covenants providing against a similar occurrence. (*Davison v. De Freest*, 3 *Sand. Ch. R.* 456.) A sale of real estate devised to an infant, if ordered by the court, contrary to the provisions of the devise, is utterly void, and passes no title to the purchaser, as contravening the statute upon this subject, even though "the interest of the infant" was promoted thereby. Such cases are expressly excepted from the grant of power, and the court is just as destitute of jurisdiction with respect to them as though no statute existed. (*Rogers v. Dill*, 6 *Hill's R.* 415, 417. *And vide Matter of Turner*, 10 *Barb. R.* 553.)

§ 195. In the State of New Jersey it has been held, that the lands of an infant may be sold for his benefit, and the property changed from real to personal, under the authority and direction of the legislature without regard to the interests of personal representatives; that the validity of the title under such sale does not

depend upon the assent of the infant, and that he cannot disaffirm the sale on coming of age; and further that the authority of the legislature to convert the property of an infant from real to personal cannot be questioned; and when there is no breach of trust, or violation of good faith, or sinister design, on the part of the guardian who applies for the law, the act cannot be impeached.

It was further held, in the same case, that courts of equity may, and frequently do, change the character of property belonging to infants; and that they will permit guardians or trustees to do it, when it is manifestly for the advantage of the owner, without reference to the contingent interests of real or personal representatives, and further, that when the property of an infant is changed, by authority of a competent tribunal, from real to personal, it will, upon the death of the infant, go to his personal representatives; and yet, if there has been a breach of trust, as when the trustee or guardian has abused the trust, and changed the quality of the estate to subserve his own interest, there arises an equity to undo the act in favor of the person whose rights are injured; but that there is no equity between the personal representative and the heir as such, because both are volunteers, and each must take what they find at the death of the person entitled for life in the condition in which they find it. (*Snowhill v. Snowhill*, 2 *Green's Ch. R.* 20.)

In the State of Virginia, it has been held, that under the statutes of the state, the court of chancery may decree a sale of the property of an infant in all cases, when it manifestly appears to be for their interest that such sale shall take place, and that the rights of others will not be violated thereby; and further, that the court also has power to direct and secure the investment of the fund for the benefit of the infant, in such manner as to the court may seem best. (*Garland v. Loving*, 1 *Rand. R.* 396.)

In Ohio, when an administrator, by the advice of the family and friends of an infant heir, receives the rents of the real estate, and applies them in payment of the debts of the ancestor's estate, instead of selling the infant's land for that purpose, and the arrangement is beneficial to the infant, his administrator cannot afterward recover such rents from the administrator of the ancestor, although the arrangement has the effect to change the distribution of the infant's estate to the extent of the rents so applied. (*Turpin's Administrator v. Turpin*, 16 *Ohio S. R.* 270.)

§ 196. With respect to the proceedings to procure the sale of an infant's real estate, they are always regulated by statute and the rules of the courts. Thus, in the State of New York, it is provided by statute that, upon the application to the court for the sale or other disposition of the real estate of an infant, the court shall appoint one or more suitable persons guardians of such infant, in relation to the proceedings on such application, who must give bond to the infant, to be filed with the clerk of the court, in such penalty, with such sureties, and in such form, as the court shall direct, conditioned for the faithful performance of the trust imposed, for the paying over, investing and accounting for all moneys that shall be received by such guardians, according to the order of any court having authority to give directions in the premises, and for the observance of the orders and directions of the court, in relation to the said trust; and upon the filing of such bond, the court is authorized to proceed in a summary manner, by reference to a referee, to inquire into the merits of such application. (2 *R. S. part 3, ch. 1, tit. 2, §§ 171, 172, 174. 2 Stat. at Large, 202, 203.*)

By the rules of the court, it is provided that an infant, by his general guardian, if he has any, and if there is none, by his next friend, may present a petition, stating the age and residence of the infant, the situation and value of his real and personal estate, the situation, value and annual income of the real estate proposed to be sold, and the particular reasons which render a sale of the premises necessary and proper; and praying that a guardian may be appointed to sell the same. The petition must also state the name and residence of the person proposed as such guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given; and the petition must be accompanied by affidavits of disinterested persons, or other proofs, verifying the material facts and circumstances alleged in the petition, and if the infant is of the age of fourteen, he is required to join in the petition. (*Sup. Court Rules, No. 66.*) The rules of the supreme court govern the county courts in proceedings relating to the sale of infant's estate. (*Code of Procedure, § 470.*)

When several infants are interested in the same premises as tenants in common, the application in behalf of all must be joined in the same petition, although they may have several general guardians. (*Sup. Court Rules, No. 69.*)

If the infant is over fourteen, and resides out of the state, his signature to the petition will be dispensed with. (*Edwards on Referees*, 398.) If the infant has no general guardian, that fact ought to be stated in the petition. (*Matter of Lansing*, 3 *Paige's R.* 265.)

The application, if made to the supreme court, must be made at special term, and the proceedings cannot be entertained at chambers. "Sound policy requires that the supreme court, like the temple of Janus, should sometimes be shut, and that its business should be done at regular terms, and that the public have prior notice of its sittings." (*Matter of Bookhart*, 21 *Barb. R.* 348, 351.) The same rule applies when the application is made to the court of common pleas of the city and county of New York, or to the superior court of the city of Buffalo.

If the application is made to the county court, the same may be made in term, or to the judge at chambers, as the county court is always open for the transaction of any business for which no notice is required to be given to an opposing party. (*Code of Procedure*, § 31.)

The application is always *ex parte*, and the petition should be addressed to the proper court. (*Matter of Bookhart*, *supra*.)

§ 197. The statute above cited provides that the court shall appoint one or more suitable persons guardians in relation to the proceedings, and the court has further provided by rule that "if it satisfactorily appears that there is reasonable ground for the application, an order may be entered appointing a guardian for the purposes of the application, on his executing and filing with the clerk the requisite security, approved of as to its form and manner of execution, by a justice of the court or a county judge, signified by his approbation indorsed thereon, and directing a referee to ascertain the truth of the facts stated in the petition, and whether a sale of the premises or any, and what part thereof, would be beneficial to the infant, and the particular reasons therefor; and to ascertain the value of the property proposed to be sold, and of each separate lot or parcel thereof, and the terms and conditions on which it should be sold; and whether the infant is in absolute need of any, and what part, of the proceeds of the sale for his support and maintenance, over and above the income thereof, and his other property, together with what he might earn by his own exertions. And if, there is any person entitled to dower in the premises, who is will-

ing to join in the sale, also to ascertain the value of her life estate in the premises, on the principle of life annuities. But no proceedings shall be had upon such reference until the guardian produces a certificate of the clerk, that the requisite security has been duly proved or acknowledged, and filed agreeably to the order of the court, and which certificate shall contain the name of the officer by whom it was approved, and shall be annexed to the report." (*Sup. Court Rules*, No. 67.)

With respect to the special guardian, it has been held, that a part owner of the property who is also a creditor against the infant's share, ought not to be appointed, however responsible and correct his general conduct may be. (*Matter of Tillotsons*, 2 *Edw. Ch. R.* 113.) The court will usually appoint the general guardian of the infant the special guardian in these cases, and another person will not be appointed without some special reason shown to the court. (*Matter of Wilson*, 2 *Paige's R.* 412.) A husband cannot be appointed the special guardian to sell the estate of his infant wife, though a third person may be appointed with the consent of the husband, to join with him in the sale. (*Matter of Lansing*, 3 *Paige's Ch. R.* 265.) The statute with respect to security by the guardian, is imperative, and cannot therefore be dispensed with, and the rule provides that it must be proved or acknowledged in the same manner as deeds of real estate, and the sureties are required to justify in the usual form. (*Sup. Court Rules*, Nos. 6, 67.) It has been held, that when a piece of real estate was ordered to be sold for the benefit of *five* infant children, and the guardian gave to each infant a separate bond, under the rules of the court, with the same sureties, who justified in each case according to the penalty in each bond being different in amount, such justification was not in accordance with the spirit of the rules, although it might conform to the letter. The sureties being the same in each case, they should have justified in respect to their ability, as to the *aggregate penalties* of the several bonds. (*Anonymous*, 4 *How. Pr. R.* 414.)

§ 198. The referee is required to ascertain the truth of all the matters stated in the rule, and make his report to the court. He should take testimony as to facts, either by reference to the petition or otherwise. He does not take down the testimony at length, but he must examine witnesses as to the facts required to be ascertained, and not rely upon the petition for proof of the facts, and the result should be stated in the report, together with a statement

of the particular reasons which, in his opinion, render a sale necessary or proper. (*Sup. Court Rules*, No. 67. *And vide Matter of Morrell*, 4 *Paige's R.* 44.) If the referee reports in favor of the application, the court will next order the guardian to contract for the sale or other disposition of the property, upon terms at least as favorable as those specified in the report. After the special guardian has made the agreement for the sale or other disposition of the property, in pursuance of the order, he must report the same to the court under oath, whereupon, if satisfactory, the court will grant an order confirming the report and authorizing a conveyance to be executed, under the direction of the court, on the purchaser complying with the terms of the contract of sale. All sales, leases, dispositions and conveyances, made in good faith by the guardian, in pursuance of such orders, when so confirmed, will be valid and effectual, as if made by such infant when of full age. (2 *R. S.* part 3, ch. 1, tit. 2, §§ 175, 177, 178. 2 *Stat. at Large*, 203.)

The special guardian cannot have an order requiring the purchaser to take the property, without showing a legal or equitable and binding contract; and it has been held that a special guardian who sells property of an infant, under an order of court, should enter into a written contract with the purchaser, subject to the ratification of the court, specifying therein the terms and conditions of the sale, and the manner in which the purchase-money is to be secured, and the time of payment. And the written contract should be signed by the special guardian and by the purchaser, so as to prevent any dispute as to the terms and conditions of the sale. (*Matter of Hazard*, 9 *Paige's R.* 365.)

The order confirming the report of the special guardian of his agreement to sell, must also direct with respect to the application and disposition of the proceeds of the property, and the investment of the surplus belonging to the infant, so as to secure the same for his benefit, and must direct a return of such investment and disposition to be made on oath, as soon as may be, and must require accounts to be rendered periodically by any guardian or other person who may be entrusted with the disposition of the income of such proceeds. (2 *R. S.* part 3, ch. 1, tit. 2, § 179. 2 *Stat. at Large*, 203, 204.) The sale, however, will in no case give to the infant any other or greater interest or estate in the proceeds of such sale, than he had in the estate so sold, but the proceeds will be deemed real estate of the same nature as the property sold. (*Ib.* § 180.) The

statute further provides, that if the real estate of the infant shall be subject to dower, and the doweress shall consent in writing to accept a gross sum in lieu of such dower, or the permanent investment of a reasonable sum, in such manner as that the interest thereof be made payable to the doweress during life, the court may direct the payment of such sum in gross, or the investment of such sum as shall be deemed reasonable, and shall be acceptable to the doweress in manner aforesaid, and the sum so paid or invested must be taken out of the proceeds of the sale; but before any such sum shall be paid or invested, the court must be satisfied that an effectual release of such right of dower has been executed. (*Ib.* §§ 181, 182.) The direction with respect to dower should be contained in the order confirming the guardian's agreement to sell. In case a mortgage is given to secure the purchase-money or any part of it, it should be taken in the name of the treasurer of the county in which the sale is ordered, or such other county treasurer as the court shall indicate; or the mortgage may run to the general or special guardian of the infant, if the court so direct. (*Laws of 1848, ch. 277, §§ 1, 8. Sup. Court Rules, No. 81.*) The mortgage would be valid if taken directly to the infant himself.

§ 199. The conveyance will be executed to the purchaser by the special guardian, and in making the conveyance he must follow strictly the order of the court directing it. When the order directed infants to convey all their interest in certain real estate, the deed to be executed by their guardian *ad litem*, in the name of the infants; it was held that a deed, reciting the appointment of the special guardian, in which the infants were named as parties of the first part, without the guardian's name being mentioned, and which was executed and acknowledged by the infants, and by their special guardian in fact, but without any addition to his signature indicating the character in which he executed it, was not pursuant to the order, or one which the purchaser was bound to accept. The guardian should execute the deed by subscribing the name of the infant, and adding "by A B, his special guardian." It was further held in the same case, that if the order merely directs the infants to convey their interest, personal covenants vested in the deed executed on their behalf, are void. (*Hyatt v. Seeley, 11 N. Y. R. 52. Matter of Windle, 2 Edw. Ch. R. 585.*) But it has been held by the supreme court, at general term, in a case not reported, that where the county court ordered a sale of the infant's

real estate, and directed the special guardian to contract therefor, and he contracted in his own name as special guardian, which the court approved and directed him to convey, the deed executed by him in his own name, as special guardian, and not purporting to be made by the infant by him as such guardian, was duly executed. It was further held that in such a case the conveyance is by the court, and the guardian, in executing it, acts only as its officer, like the sheriff, or a master in chancery, in conveying upon other judicial sales. (*Ely v. Lessler*, Oct. Gen. Term, 1858, not reported.)

§ 200. An order of the court authorizing and directing the sale of an infant's real estate, fraudulently obtained, is of no validity whatever, and the order, and all of the proceedings founded thereon, for the purpose of obtaining the title of the infants to such real estate, will be annulled, vacated and set aside, whenever such fraud is made to appear. Fraud not only vitiates all sales and conveyances into which it enters, but the power and authority to sell and convey, also, from whatever source derived. An order giving a party authority to sell and convey, fraudulently obtained from a court, is no better than a power fraudulently derived from the party whose rights are injuriously affected by it. It may also be annulled at the instance of the party making the sale, upon establishing the fraud, at least as to all persons who were parties or privies to such fraud. (*Clark v Underwood*, 17 Barb. R. 202.)

A court of equity will not compel an unwilling purchaser in these cases to take a *doubtful title*. At law, when a party seeks to disaffirm and rescind a contract of sale, and to recover back the deposit of his purchase-money, on the ground of a defective title, he must satisfy the court that the title is *absolutely bad* before he can recover; but the court, in the exercise of its *equity* powers, may give relief in case of a doubtful title. (*O'Reilly v. King*, 28 How. Pr. R. 408. *Vide Pitcher v. Coster*, 4 Sand. Ch. R. 1.)

An objection that the *special guardian* of the infant entered into a contract of sale conjointly with the adult owners, and that the deed tendered to the plaintiff was, in like manner, executed by the guardian with the other owners, will not be regarded. That other parties, owning other interests, joined in the same *contract and deed*, could not deprive either instrument of its binding effect upon all parties concerned. (*O'Reilly v. King*, *supra*.) The statute providing for the sale or other disposition of the real estate of infants by the courts, applies only to cases in which the *legal*

title is in the infants, though courts of equity have inherent jurisdiction, independently of statute, to order a sale of the *equitable* estates of infants. (*Wood v. Mather*, 38 Barb. R. 473.) When infants hold land as tenants in common, determinable as to each on his death without issue, and his interest, upon such contingency, to go to the survivors, and, on the proper application, the court directs the sale of the land, it will be deemed that the court intended that the whole title should be acquired by the purchaser, and on any of the proceeds coming within the control of the court, it will require the infants, on coming of age, to convey to the purchaser, as a condition of receiving such proceeds. (*Davison v. De Freest*, 3 Sand. Ch. R. 456.)

§ 201. The proceeds of the sale of the real estate of an infant under an order of the court are to be deemed real estate by the statute, and if the infant be a *feme-covert*, the money cannot be paid to her husband on her petition; but on her coming of age, it may be paid to him on their petition, if the court is satisfied upon a private examination of her, apart from her husband, that she signed the petition voluntarily, without any fear or compulsion of her husband, and adheres to its prayer. (*Matter of Finch*, *Clark's Ch. R.* 538.)

In another similar case, in the supreme court, it was held that, by the sale of the land under the direction of the court, there was no conversion of the real estate into personalty, but that the proceeds were impressed with the same real uses which attached to the real estate before the sale; and that such proceeds *descended*, as the real estate would have done, to the *heirs at law* of the infant, and did not go to her personal representatives, for distribution among the next of kin and others entitled thereto. (*Shumway v. Cooper*, 16 Barb. R. 556.) But the court of appeals have held that the statute does not permanently impress the character of realty upon the proceeds of the sale; upon the infant's coming of age, he becomes capable of controlling and disposing of such proceeds and if he takes the control of the bond and mortgage given on the sale of his land while an infant, such bond and mortgage will be deemed personal property. (*Foreman v. Marsh*, 11 N. Y. R. 544.) If the proceeds of the sale exceed five hundred dollars, and the guardian has not given security by mortgage upon real estate, he must bring the proceeds into court, or invest the same under the direction of the court for the use of the infant; and the guardian

will only be entitled to receive so much of the interest or increase thereof from time to time, as may be necessary for the support and maintenance of the infant, without the order of the court. (*Sup. Court Rules, No. 69.*) When the money is brought into court, it must be paid over to the treasurer of the county in which the sale was ordered; or, if the sale was ordered in the city of New York, the money must be paid over to the chamberlain of the city. (*Laws of 1848, ch. 277, § 1.*)

No moneys arising from the sale of the real estate of an infant must be paid over to his general guardians, except so much thereof of the interest or income from time to time as may be necessary for his support or maintenance, unless such guardian has previously given sufficient security on unencumbered real estate to account to the infant for the same, in the usual form. (*Sup. Court Rules, No. 62. And vide Laws of 1848, ch. 277, § 8.*) The costs of the proceedings are to be paid out of the proceeds of the sale; and these costs are to be allowed by the court. If the infant's interest in the property sold does not exceed one thousand dollars, the whole costs, including disbursements, cannot exceed twenty-five dollars. (*Sup. Court Rules, No. 69.*) If the interest in the property exceeds five hundred dollars, the costs may be allowed according to the rate for similar services in civil actions. (*Laws of 1854, ch. 270, § 3.*)

§ 202. According to the old practice, when the sale has been consummated by the payment of the purchase-money and the delivery of the deed to the purchaser, the guardian should make his final report to the court, stating the facts of the execution and delivery of the conveyance, the payment of the purchase-money, and the disposition of the same, and the deductions made from the proceeds of the sale for costs, all in a plain, business-like manner; on which the court will grant an order confirming the report and the sale and conveyance, and the disposition of the proceeds. (2 *Barb. Ch. Pr.* 217.) This is not required by any statute, or express rule of court, but in analogy to similar proceedings in a court of equity, it is safer to make the report and obtain such order.

All the proceedings in the cases of special guardianship to sell infant's estates must be filed in the office of the clerk where the order of appointment of the guardian was entered. (*Matter of Seaman, 2 Paige's R.* 409.)

§ 203. In the State of Kentucky, a guardian applying to the circuit court for an order to sell the real estate of infants, is required by statute to give bond for the faithful performance of the trust, before the decree is rendered; also, to report his proceedings under the decree to the court. The proceeds of the sale in such cases, are to be disposed of for the benefit of the infants, according to the order of the court decreeing the sale, and not otherwise. (*Winlock v. Winlock*, 1 *Dana's R.* 382.)

In the State of North Carolina, the proceeds of land sold for partition under the statute, to which an infant is entitled, remain real estate until the infant comes of age, and elects to take them as money; and if the infant be a female and marry, and her guardian, to whom the proceeds of such sale had been paid by order of the court of equity, pay the same to her husband, upon her death, they will descend as land to her real representatives, and this, whether she married and died before or after she became of age; if in the latter case, she never elected herself while sole to take such proceeds as money, nor consented in the manner provided by law after marriage, that her husband should so take them. (*Scully v. Jernigan*, 2 *Dev. & Batt. R.* 144.)

In the State of Massachusetts, it has been held that if a guardian, who has obtained license to sell the real estate of his ward, purchases the same himself, either directly or indirectly, the sale is voidable only by the ward, and as against the guardian, or a purchaser claiming under him with knowledge of the circumstances of the sale; but not as against one to whom, before it is so avoided, he conveys or mortgages the estate for a valuable consideration, and without notice that it had been bought at the guardian's sale for the guardian's benefit. (*Wyman v. Huston*, 2 *Gray's R.* 141.)

§ 204. In the State of New York, the statute also provides that the supreme court may decree and compel a specific performance, by any infant heir or other person, of any bargain, contract or agreement made by any party who may die before the performance thereof, on petition of the executors or administrators of the estate of the deceased, or of any person or persons interested in such bargain, contract or agreement, and on hearing all parties concerned, and being satisfied that the specific performance of such bargain, contract or agreement ought to be decreed or compelled. (2 *R. S. part 3, ch. 1, tit. 2, § 169.* 2 *Stat. at Large*, 202.) The county

court also has jurisdiction in these cases. (*Code of Procedure*, § 30, *sub.* 7.)

It has been held, under this statute, that the infant heir will not be compelled, in the conveyance, to enter into personal covenants, in pursuance of an agreement made by an ancestor; but the heir can be compelled to convey, in pursuance of such contract, although the heir is not named in the contract. (*Hill v. Resseguen*, 17 *Barb. R.* 162. *Matter of Ellison*, 2 *Johns. Ch. R.* 20.) It has also been held that where a bill, for a specific performance of a contract, is filed against the heir of the party who made the contract, and such heir is a lunatic, neither the lunatic nor his estate can be charged with the costs of the suit; and, in no case, will the heir be charged with such costs, where no application had been made to him to carry into effect the contract, previous to filing the bill, and there has been no refusal or neglect on the part of the heir to execute the contract. (*Swartwout v. Burr*, 1 *Barb. R.* 495.)

The proceedings in these cases are similar to the proceedings in cases of applications to sell an infant's real estate, and it is, therefore, unnecessary to give the particulars here.

§ 205. The statute of the State of New York also provides that whenever any infant shall be seised or possessed of any lands, tenements or hereditaments, by way of mortgage, or in trust only for others, the supreme court, on the petition of the guardian of such infant, or of any person in any way interested, may compel such infant to convey and assure such lands, tenements and hereditaments to any other person, in such manner as the said court shall direct. (2 *R. S. part 3, ch. 1, tit. 2*, § 167. 2 *Stat. at Large*, 202.)

In cases under this statute the court will appoint some proper person to execute a legal conveyance. (*De Barante v. Gott*, 6 *Barb. R.* 492.) And all of the proceedings are similar to those in applications for the sale of an infant's real estate, and the practice need not be repeated here.

In all of these cases the application is regarded as a special proceeding, within section eleven of the Code of Procedure, and an appeal may therefore be taken from the order therein to the general term of the supreme court, if made at a special term or by the county court; and from the decision at general term an appeal may be taken to the court of appeals. (*Hyatt v. Seeley*, 11 *N. Y. R.* 52. *Laws of 1857, ch. 723*, § 19.)

The costs of the appeal, in these cases of special proceedings, are in the discretion of the court, and are governed by the Code of Procedure. (*The People v. Sturtevant*, 9 *How. Pr. R.* 304. *The People v. Colborne*, 20 *ib.* 378.)

This brings us naturally to the conclusion of the treatise upon the subject of infants. It is presumed that the survey here given will enable the attentive student to determine the law applicable to every case of infancy which may arise in his practice.

PART II.

THE LAW OF COVERTURE.

CHAPTER XVIII.

THE COMMON LAW DOCTRINE OF COVERTURE—THE GENERAL DISABILITY OF THE WIFE—MUTUAL DISABILITIES INCIDENT TO THE MARRIAGE UNION.

§ 206. THE subject of coverture is becoming more and more important, and the rights of married women are becoming more and more a subject of inquiry. In all heathen nations woman is the ignorant slave or the degraded plaything of the man, regarded by him as fit only for the lowest drudgeries, and to minister to his sensual passions and pleasures. In Christian nations she is the companion of man, and considered his equal; and, in many of the States, she is recognized as a being in every respect worthy to share with man the highest culture, and to enjoy equally with him the rights of property. The legislation of the country has undergone a great change upon this subject within the last fifty years, and not only are laws passed to secure to married women the control and disposition of their property, but the question is seriously agitated, both here and in England, whether the elective franchise ought not to be extended to women equally with men; and, upon purely abstract principles, much is said in favor of the proposition. It is probable, however, that the “merely natural reasons, such as difference of sex,” will prevail against any abstract principle, and that some time will yet ensue before *true* women will claim the right of suffrage for themselves. Nature seems to have assigned to females a more limited sphere of action than to males, and hence they may very properly be excluded from a participation in public affairs. But the law of coverture is becoming a very interesting and important branch of English and American jurisprudence, and makes a very prominent and extensive article in the codes of all civilized nations.

§ 207. The word coverture, in law, signifies the state of a married woman, for the reason that she has always been regarded as under the *cover* or the power of her husband, and, because she should always be under his wing and protection. A married woman, therefore, is called, in law-French, a *feme-covert foemina viro cooperta*. The origin of this term is not certain. Among the ancient Romans the modesty of the bride was so much consulted that, upon the delicate occasion of her nuptials, she was led to the home of her husband *covered* with a veil; and it is quite probable that the term originated in this custom. But whatever the origin of the term, time out of memory the condition of woman during her marriage has been called her *coverture*. By the marriage the husband and wife are one person in law, and upon this principle of a union of person depend almost all the legal rights, duties and disabilities that either husband or wife acquire by the marriage. For this reason a husband cannot, by any conveyance at common law, give an estate or grant any thing to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and what is true of the husband in this respect is also true of the wife. Neither husband nor wife can contract with the other at common law, although each may enter into covenant or contract for the benefit of the other through the intervention of a trustee; and some of the transactions between husband and wife may be supported by a court of equity. It may also be laid down as a general proposition that all compacts made between husband and wife when single are nullified by the intermarriage. Thus, at law, if a man make a bond or contract to a woman before marriage, and they afterward marry, the bond or contract is discharged; or if two men make a bond or contract to a woman, and one of them marries her, the bond or contract is discharged. (*Vide* 1 *Black. Com.* 442, n. 40.) There are, however, covenants and contracts by a man with a woman which are not destroyed by their marriage, and these will be noted hereafter.

§ 208. At common law the personal existence of a married woman, for most purposes, is merged in that of her husband; and, especially in matters of contract, she is subject to a greater disability than infants. This was not the fact among the Anglo-Saxons, but such has been the rule ever since the adoption of the feudal system. The rule "that the husband and the wife are in law but one person,"

did not exist in the enlightened system of Roman jurisprudence, from which the common law has derived the most durable as well as the most valuable of its rules and maxims, nor has it ever prevailed in other countries, where the law as a science has been studied as profoundly, and interpreted as comprehensively, as by the jurists of England. In all these countries the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts and injuries, and may also by agreement with each other have a community of interest.

Dr. Hartley, a metaphysician of the last century, who wrote a book of some reputation, entitled "Observations upon Man," supports the maxim of the English law, that man and wife are to be regarded as but one person, by the broad declaration that the authority of the man over the wife is but a mark of our degenerate state, by reason of which dominion must be placed somewhere, and therefore in the man. (*Gould v. Gould*, 29 *How. Pr. R.* 463, *dissenting opinion of Judge Daly*.) "The wife was precluded from the enjoyment of property, for whatever belonged to her while single, or came to her while covert, passed absolutely to the husband, or fell under his dominion. In vulgar phrase, what was hers became his, and what was his remained his own; she could possess nothing to her separate use; she could alienate nothing in her life-time; she could bequeath nothing by her death." (*Macqueen on Husband and Wife*, 283.)

The contracts of infants, as we have seen, are, for the most part, only voidable, while those of married women are, with few exceptions, absolutely void. But the disabilities incident to infancy and coverture, arise on grounds very different from each other. Those attached to infancy are designed as a protection for the inexperienced against the fraudulent; while those incident to coverture are the simple consequence of the authority which the law recognizes in the husband. The law regards it as necessary for the preservation of peace, that when two or more persons are destined to pass their lives together, one should possess the pre-eminence, in order to prevent or terminate disputes; and the reason why this pre-eminence is vested in the man is, because he is the stronger, and it was also supposed that the man, by his education and manner of life, acquires more experience, more aptitude for business, and more judgment, than the woman. Of course there are exceptions in this respect, but the law designs to keep in view the ordinary

course of things, and those who would entirely abrogate this rule, unwittingly hold out to the woman a dangerous snare. It is conceded that the rule of the common law is in many respects cruel and oppressive, and not in accordance with the existing state of society; but in making the changes that are at present going on, great caution is needed, "in order to improve and liberalize the marital relation, without inflicting upon it great injury." (1 *Parsons on Con.* 284.)

§ 209. Says Sir Thomas Smith: "The naturalist and first conjunction of two toward the making a further society of continuance, is of the husband and wife, each having care of the family; the man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten, for the nurture of the children and family; which to maintain, God has given the man greater wit, better strength, better courage, to compel the woman to obey, by reason or force; and to the woman, beauty, fair countenance, and sweet words, to make the man obey her again for love. Thus each obeys and commands the other; and they two together rule the house, so long as they remain in one." (*Smith's Commonwealth of England*, book 1, ch. 2.)

The great apostle to the Gentiles, in his reference to the sacred relation of husband and wife, exhorts the wife to be subject to her own husband for her good; and to render this submission more easy, beneficial and comfortable, the husband is commanded to love his wife, with that tender, constant, faithful and compassionate affection which Christ showed to his church, saying: "So ought men to love their wives as their own bodies;" adding: "he that loveth his wife, loveth himself." (*Ephesians*, ch. 5, verses 22, 25, 28.) Here is declared the true effect which should follow the union of husband and wife as one person, according to the principle of the common law, which is recognized by the codes of all Christian and civilized nations.

§ 210. In treating further of the powers and faculties which the policy of the common law withholds from married women, it may be asserted that every agreement entered into by a married woman, especially while living with her husband, without the express or implied consent of her husband, is absolutely void (*Worthington v. Young*, 6 *Ohio R.* 313); nor can a married woman, at common law, be sued for any cause whatever, without her husband be joined with her in the process.

At common law, the separate deed of a married woman conveying her real estate is void; and this is the rule, though she has received the full consideration for the land conveyed, and the proceeds were actually necessary for her maintenance and support. (*Stoops v. Blackford*, 27 Penn. R. 213. *Richards v. McClelland*, 29 *ib.* 385.) So, also, a *feme-covert* is incapable of making a contract that can be enforced in any manner against her. Her disability in this respect, though like that of an infant, is even more complete. (*Keen v. Hatman*, 48 Penn. R. 497, 499.)

A deed of the wife's land, executed by both husband and wife, but not delivered during her life-time, cannot be rendered effectual to pass the estate as against the heirs of the wife, by a delivery after her decease. (*Schoenberger's Exrs. v. Zook*, 34 Pennsylvania R. 24.)

The wife may join with her husband in the execution of a deed of real estate in the manner pointed out by statute; but at common law, if such a deed be defective, it cannot be rectified as to the wife. (*Carr v. Williams*, 10 Ohio R. 305. *Purcell v. Gorham*, 17 *ib.* 105.) But now, by an express enactment of the Ohio legislature, such a deed may be corrected on application to the court. (*Gorham v. Purcell*, 11 Ohio St. R. 641.)

In order that the wife may be bound by her deeds or her contracts, she must in all cases pursue the course pointed out by the statute. (*Needles v. Needles*, 7 Ohio St. R. 432.) And a deed not in accordance with the statute is a *nullity*, and, as a contract for a conveyance, it is alike null and void. (*Miller v. Hine*, 13 Ohio St. R. 565.)

A *feme-covert* is incapable of executing a power of attorney, but her husband may appear and act for her in any case in which she may be heard without a power of attorney. (*Morris v. Garrison*, 27 Penn. R. 226.)

Indeed, by the principles of the common law, a *feme-covert*, in general, can do no act to bind herself; she is said to be *sub potestate viri*, and subject to his will and control. Her acts are not like those of infants, and some other disabled persons, voidable only; but are, in general, absolutely void *ab initio*. (*Vide Elliott v. Peirsol*, 1 Peters' R. 338.)

It has been held that a married woman's bond cannot be made good by the fact that she represented herself to be single, and thereby obtained the consideration. In giving the opinion of the

court, the judge made the following quotation: "If a legal incapacity can be removed by a fraudulent representation of capacity, then the legal incapacity would have only a moral bond or force, which is absurd." (*Keen v. Coleman*, 39 Penn. R. 299.)

A *feme-covert* cannot assign a mortgage executed to her, or pledge it for the payment of her husband's debts, unless her husband join with her in the assignment or pledge. (*Stoops v. Blackford*, 27 Penn. R. 213, S. C. 1 Phila. R. 563.) Neither can she bind herself at common law by her promissory note, and her note is not made valid by the statutes of Pennsylvania enlarging the powers of married women. (*Inhoff v. Brown*, 3 Phila. R. 45. *Vide also Griffith v. Clarke*, 18 Md. R. 457. *Van Steenburgh v. Hoffman*, 15 Barb. R. 28.)

It has been held, even, that a *feme-covert* living separate and apart from her husband, and having a separate maintenance secured to her by deed, cannot contract, or be sued as a *feme-sole*. (*Marshall v. Rutton*, 8 Term R. 545. *Beard v. Webb*, 2 Bos. & Pull. R. 93.) And again, where a wife had been living apart from her husband, but both husband and wife lived within the same state, for about two years, when she gave a note as *feme-sole* to a man who knew the fact of her marriage, in an action to recover the amount of the note of the wife, it was held to be error in the court to instruct the jury that the proof of coverture was no defense to this action, on the note. (*Painter v. Weatherford*, 1 Greene's [Iowa] R. 97.) At common law, a married woman has no power to bind herself by contract, or to acquire to herself and for her own benefit any rights, by any contract made with her; and so strongly does this rule prevail, that the wife may avail herself of her coverture to defeat a contract, though she have been guilty of fraud. (*Keen v. Coleman*, 39 Penn. R. 299. *Davenport v. Wilson*, 4 Camp. R. 26.)

By statute the wife may, in conjunction with her husband, and on due examination before a competent officer, convey her real estate or any existing or contingent future interest in it; and, by the statute of some states, she may convey her lands without the concurrence of her husband; but her deed in no instance can operate as an *estoppel* to her subsequently acquired interest in the same land, nor will she be bound by her covenants of warranty. (*Jackson v. Van Derheyden*, 17 Johns. [N. Y.] R. 167. *Teal v. Woodworth*, 3 Paige's Ch. R. 470. *Carpenter v. Schemerhorn*, 3

Barb. Ch. R. 314. *Dominick v. Michael*, 4 *Sanaf. Ch. R.* 374, 423.) In one case, however, in the supreme court of the State of New York, a judge at special term has intimated that a *feme-covert* may be estopped by her fraud, saying: "A married woman can no more be allowed to commit a fraud than a single woman; her deed is not valid unless when relating to real estate and duly acknowledged, but she is liable for torts committed by her, and is competent to know the difference between fraud and honesty, and to understand the obligation not to stand by and allow another to purchase from her, who supposes she has a perfect title when she knows she has not." (*Mount v. Morton*, 20 *Barb. R.* 123, 131.) But this does not purport to overthrow the doctrine of the other authorities, and the rule may still be regarded as well settled, that a married woman is not bound by her covenants of warranty, and her deed cannot be used to estop her from claiming a subsequently acquired interest in the lands conveyed. Nor does the acceptance of a deed by a *feme-covert* estop her from setting up a prior title in herself. (*Jackson v. Carey*, 16 *Johns. R.* 302. *But vide Hill v. West*, 8 *Ohio R.* 222.)

A *feme-covert*, by the principles of the common law, is not only incapable of conveying her real estate by deed, but she cannot, as a general rule, make a valid contract of any description in relation either to real or personal property. This disability results from the nature of the matrimonial connection. (*Martin v. Divelly*, 6 *Wend. R.* 9, 13.) Neither can a married woman state an account of a debt contracted before marriage, and her promise after marriage to pay such debt is absolutely void. (*Morris v. Norfolk*, 1 *Tampt. R.* 212.) So, if a married woman execute and deliver a deed to a person as an escrow, and the husband die, and then the grantor perform the condition upon which the person to whom the deed was delivered gives it to the grantee as the woman's deed, it is void; because the instrument receives its inception from the first delivery and its completion upon the performance of the condition; and the second delivery is merely the execution and consummation of the first; so that, the grantor or donor, being under the disability of coverture at the time of the first delivery of the deed, the subsequent death of the husband before the compliance of the grantor or donor with the terms of it, will not remedy the original defect. (2 *Bright's Husband and Wife*, 38, and authorities cited.)

If the wife purchase an estate without her husband's knowledge and he afterward disagree to it, he may recover the purchase-money from the vendor in an action of trover. (*Granby v. Allen*, 1 *Ld. Raym. R.* 224.) And for the husband's protection also, the law incapacitates the wife to receive or dispose of money without his concurrence. Accordingly, payment of a legacy bequeathed to her personally, and not given to her separate use, will be a void payment as to her husband. (*Palmer v. Trevor*, 1 *Vern. R.* 261. *Norris v. Hemingway*, 1 *Hagg. Eccl. R.* 5.) And for a similar reason, the law disables the wife, without her husband, to suspend, alter, or release any debt made payable to herself generally, or to give, indorse or assign a promissory note or other security. (*Rawlinson v. Stone*, 3 *Wils. R.* 5. *Brown v. Benson*, 3 *East's R.* 331.)

In the case of *Brown v. Benson*, Lord Ellenborough, Ch. J., after speaking of certain acts implying a recognition of the authority of the wife sufficient to found an assumpsit against the husband, in a given case, says: "But that will not affect this question as to the general authority of a wife to bind her husband in a case where no particular authority can be implied. For this purpose she is no more than a servant, unless acting with a special authority; and it might as well be contended that if a man sent his servant to receive his money of a banker, the servant might release the debt;" and Le Blanc, J., said: "It might as well be contended that the wife has authority to pay her husband's debts with her husband's money." This was a case where a bond was given to the husband, conditioned to pay to his wife an annuity, and soon after the date of the bond the husband, being in embarrassed circumstances, left the country, and, while the husband was absent, the obligors agreed with the wife that she should give up five years' annuity, and consider it paid for that period, in satisfaction of money advanced on the bond, and the court held that the agreement was not binding.

Upon the same principle of protection to the husband and wife, a *feme-covert* is not permitted, at common law, to take upon herself the office and responsibility of an executrix or administratrix without the husband's concurrence; nor will payments made to her, as executrix or administratrix, without his consent, be valid. (*Anonymous*, 1 *Salk. R.* 280. *Bubbens v. Hardy*, 3 *Curt. R.* 50.) This is the rule at common law, but, in many of the states, married women are authorized by statute to serve as executors and admin-

istrators, in some instances, the same as a *feme-sole*, and, in others, there are certain qualifications attached.

§ 211. By the common law a *feme-covert* is not qualified to hold or possess any chattels personal, choses in action, or chattels real, and marriage operates as an absolute gift to the husband of all property coming under that description which was owned by the wife at the time of the marriage; and the husband takes the same interest at common law in personal chattels which come into his wife's possession in her own right during coverture, whether by gift or bequest, or in any other way; and the husband is also entitled to all sums of money which his wife earns by her personal skill or labor, and these he has absolutely and in his own right, and not in hers; and if he die without having recovered them, they do not survive to her, but they pass as assets to his administrators or executors. And if it be necessary to sue for them during the coverture, the action must be brought in the name of the husband alone, without joining the wife. (*Buckley v. Collier*, 1 *Salk. R.* 114. *Glover v. Proprietors of Drury Lane*, 2 *Chitty's R.* 117. *Washburn v. Hale*, 10 *Pick. R.* 429. *Prescott v. Brown*, 23 *Maine R.* 305. *Vide also Legg v. Legg*, 8 *Mass. R.* 99. *Howes v. Bigelow*, 13 *ib.* 384. *Winslow v. Crocker*, 17 *Maine R.* 29. *Merrill v. Smith*, 37 *ib.* 394. *Haskins v. Miller*, 2 *Dev. R.* 360. *Hyde v. Stone*, 9 *Cow. R.* 230. *Morgan v. Thames Bank*, 14 *Conn. R.* 99. *Matter of Grant*, 2 *Story's R.* 312. *Hawkins v. Craig*, 6 *Mon. R.* 257.) And the rule has been carried to the extent that, notwithstanding the husband lives apart from his wife, and in a state of adultery, his right to the personal property of his wife still remains so long as the marital relation exists. (*Russell v. Brooke*, 7 *Pick. R.* 65. *Turtle v. Muncy*, 2 *J. J. Marsh. R.* 82.)

In one case, where the parties lived apart under an agreement of separation, the wife saved something out of the weekly allowance which the husband gave her for her maintenance and support. The court held that the money saved belonged to the husband. (*Messenger v. Clark*, 5 *Exch. R.* 388.)

But the husband's interest in and rights over the personal property of the wife will be treated of hereafter. It may be observed that the incapacities of *femes-covert* provided by the common law apply to their civil rights, and are for their protection and interest. But they do not reach their political rights, or prevent their acquiring or losing a national character. Their political

rights do not stand on the mere footing of municipal law, applicable to ordinary transactions, but stand upon the more general principles of the law of nations. (*Shanks v. Dupont*, 3 *Peter's R.* 242.) The disabilities of the wife referred to all exist at common law, and they are especially arbitrary with respect to her deeds and contracts touching her own property. Whether the disability in these cases is regarded as having its reason on the principle that the separate legal existence of the wife is suspended during the marriage, or in the fact that the influence of the husband may be improperly exerted for the purpose of inducing the wife to part with her interest in his favor, is perhaps immaterial. The rule itself is one of undoubted authority. (*Vide Carr v. Williams*, 10 *Ohio R.* 310.)

A confession of judgment, without action, by a *feme-covert*, is void, although the consideration be money borrowed for and applied to the improvement of her separate estate. If husband and wife unite in confessing a judgment, the judgment may be retained as against the husband, though void as to the wife. (*Watkins v. Abrahams*, 24 *N. Y. R.* 72.)

In the State of Pennsylvania, however, it has been held that a married woman may confess a judgment for the purchase-money of real estate, but that execution will be confined to the real estate purchased. (*Patterson v. Robinson*, 3 *Am. Law R.* 240.) And, further, that such a judgment is invalid as a personal obligation, but it constitutes a valid lien upon the premises purchased. (*Ramberger's Administrator v. Ingraham*, 38 *Penn. R.* 146.) A *feme-covert* may satisfy a judgment given to her while sole. (*Eckert v. Lewis*, 17 *Leg. Int.* 156.)

§ 212. But there are, also, disabilities incident to the marriage union, which apply to both husband and wife. We have seen that the husband and wife cannot enter into any contracts or covenants with each other during coverture, nor will any sale or gift from one to the other be recognized by the law, for the simple reason that the husband and wife constitute but one person. It is also well settled, by the common law, that husband and wife cannot be witnesses for or against each other in a civil suit. (*Macondry v. Wardle*, 26 *Barb. R.* 612.) This principle is founded not only on the interest of the parties being one, but also on public policy. The rule is so inviolable, at common law, that the parties cannot be permitted to give testimony for or against each other, even

though the individuals interested in the particular litigation should all consent to it. (*The King v. Cliviger*, 2 Term R. 263.) There are, however, exceptions to the rule, as in cases of personal violence inflicted by one upon the other, where, from the necessity of the case, the aggrieved party will be permitted to testify to the acts of violence by the husband or wife; and, it is believed, that, in criminal prosecutions, the admissibility of the husband or wife must be confined to cases seeking security of the peace, and cases of personal violence. (*State v. Burlingham*, 23 Shep. [Me.] R. 104. *The People v. Carpenter*, 9 Barb. [N. Y.] R. 580. *The People v. Chagary*, 18 Wend. R. 637.)

In a case in the State of Tennessee, where two persons were jointly indicted for murder, one as principal, and the other as aiding and abetting, and separate trials were had, the wife of the second was offered as a witness for the first, and held competent. (*Workmen v. State*, 4 Sneed's R. 425.) [And in a case in the court of appeals of the State of New York it was held that the testimony of the wife of an accomplice may be taken into consideration in determining the credibility of the testimony of the husband. (*Haskins v. The People*, 18 N. Y. R. 344.) It has been said that the confirmation of the husband, in such a case, is really no confirmation at all, because the wife and the accomplice must be taken, in law, as but one person (*Rex v. Neal*, 32 Eng. C. L. R. 481); but this will not exclude the testimony of the wife, in such a case, from being taken into consideration by the jury. It was stated by the great Mansfield that there had never been an instance, in a civil or criminal case, where a husband or wife had been permitted to give testimony for or against each other, except in those cases where, for security of the peace, *ex necessitate*, the rule had been departed from. (*Bentley v. Cook*, 3 Doug. R. 422.) And Lord Alvanley declared, in a case before him, that a witness should not be permitted to give evidence against her former husband, as to any thing which occurred during the existence of the marriage relation, although she had been divorced, by act of parliament, before she was examined as a witness. (*Monro v. Twistleton*, Peaks' Add. Cases, 219.)

In a case in the late court of chancery of the State of New York, the chancellor (Walworth) said: "The general rule that a wife cannot be admitted as a witness for or against her husband, either in criminal or civil proceedings, is well settled in that country from

which the common law of this state is derived, and such is, unquestionably, the general rule of law here. The rule is founded upon a principle of public policy, which forbids that the peace and happiness of the married relation should be disturbed by arraying the wife against her husband as a witness, where his interest is concerned as a party in opposition to her testimony; or that he should be tempted to pervert the truth, by being called as a witness in his favor, where the intimate relation which does or should always subsist between them, renders her interests and his nearly identical. She is also prohibited from being a witness against him, upon the principle that the happiness of the married relation requires that perfect confidence should subsist between the husband and wife, so that he may freely communicate with her in relation to his business, and to all the various transactions of his life, in the full assurance that she can never afterward be compelled or even permitted to give evidence against him, to his injury, as to any matters thus communicated." (*The People v. Mercein*, 8 *Paige's Ch. R.* 47, 50.) This was said with respect to the testimony of the wife for or against her husband, and the rule is as sacred with respect to the testimony of the husband for or against his wife.

Mr. Phillipps, in his standard treatise on evidence, lays down the law on the subject thus: "This general rule of evidence, which has been adopted for the purpose of promoting a perfect union of interests, and of securing mutual confidence, is so strictly observed, that even after a dissolution of marriage for adultery, the wife is not admitted to give any evidence of what occurred during the marriage, which would have been excluded if the marriage had continued. This, as Lord Ellenborough has said, is on the ground that the confidence which subsisted between them at the time, shall not be violated in consequence of any future separation. Thus one great cause of distrust is removed, by making the confidence which once subsists, ever afterwards inviolable in courts of law." (1 *Phil. Ev.* 83.)

Professor Greenleaf, in his excellent treatise on evidence, says: "The rule by which parties are excluded from being witnesses for themselves, applies to the case of *husband and wife*; neither of them being admissible as a witness in a cause, civil or criminal, in which the other is a party. This exclusion is founded partly on the identity of their legal rights and interests, and partly on princi-

ples of public policy, which lie at the basis of civil society. For it is essential to the happiness of social life, that the confidence subsisting between husband and wife should be sacredly protected and cherished in its most unlimited extent; and to break down or impair the great principles which protect the sanctities of that relation, would be to destroy the best solace of human existence." (1 *Greenl. Ev.* § 334.)

Professor Greenleaf says again: "Neither is it material, that this relation *no longer exists*. The great object of the rule is to secure domestic happiness, by placing the protecting seal of the law upon all confidential communications between husband and wife; and whatever has come to the knowledge of either by means of the hallowed confidence which that relation inspires, cannot be afterward divulged in testimony, even though the other party be no longer living." (1 *Greenl. Ev.* § 337, referring to *Stein v. Bowman*, 13 *Peter's R.* 209.)

And once again: "Whether the rule may be relaxed so as to admit the wife to testify against the husband, *by his consent*, the authorities are not agreed. Lord Hardwicke was of opinion that she was not admissible, even with the husband's consent; and this opinion has been followed in this country; apparently upon the ground that the interest of the husband in preserving the confidence reposed in her is not the sole foundation of the rule, the public having also an interest in the preservation of domestic peace, which might be disturbed by her testimony, notwithstanding his consent. The very great temptation to perjury, in such case, is not to be overlooked." (1 *Greenl. Ev.* § 340.)

Even after the parties have been divorced *a vínculo matrimonii*, the husband and wife will not be permitted to take the stand as a witness for or against each other, and disclose any of the transactions which passed between them while the marriage relation existed, because this would clearly impair that mutual confidence between husband and wife, which society requires, and which the law designs to protect. If the rule were otherwise, it has been well said, that designing men might even become instrumental in producing a divorce, for the very purpose of using the testimony of the husband or wife to penetrate the secret affairs of the other. The only safe and correct practice is, to adhere to the rule, that whatever passes between husband and wife in confidence, shall forever remain sacred. (*Vide Barnes v. Comack*, 1 *Barb. R.* 392,

396. *Smith v. Smith*, 15 *How. Pr. R.* 165. *State v. Phelps*, 2 *Tyler's [Vt.] R.* 374.)

§ 213. As has been suggested, there are exceptions to the rule at common law, that neither husband nor wife can testify for or against each other, but these exceptions are usually admitted from the necessity of the case, to prevent an entire failure of justice. These exceptions, however, are never allowed to interfere with the general doctrine that trust and confidence between husband and wife shall not be betrayed. Thus, in one case the dying declarations of a wife were admitted against the husband in an action upon a policy of insurance on the life of the wife, respecting her health at the time the insurance was effected. Lord Ellenborough explaining: "No confidence has been violated; nothing extracted from the bosom of the wife which was confided there by the husband; but the question being, what was the state of her own health at a certain period, a witness has been received to relate that which has always been received from patients to explain, her own account of the cause of her being found in bed at an unreasonable hour with the appearance of being ill. She was questioned as to her bodily infirmity. She said it was of some duration, several days." And again: "The admission then of the evidence in this case is free from any imputation of breaking in upon the confidence subsisting between man and wife; the declaration was upon the subject of her own health at the time, which is a fact of which her own declaration is evidence, and that too made unawares before she could contrive any answer for her own advantage and that of her husband." And Grose, J., in explanation said: "In strictness such declarations are admissible not so much as evidence of confession of the wife against her husband, as of the actual state of her health in her own opinion at the time." (*Aveson v. Kinnaird*, 6 *East's R.* 188.)

And in a still earlier case, which was an action by the husband and wife for wounding the wife, Lord Chief Justice Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise any thing for her own advantage, to be given in evidence as part of the *res gestæ*; and it was supposed that the evidence admitted in the case of *Aveson v. Kinnaird* fell within the principle of the case of Lord Holt. (*Thompson v. Trevannion*, *Skin. R.* 402.)

After the death of the husband, the testimony of the widow to facts within her own knowledge, not derived from the husband, is competent to show that a conveyance by the husband was made to defraud his creditors. (*Short v. Tinsley*, 1 *Metcalf's* [Ky.] R. 397.) And in an action against an administrator for work and labor performed for the intestate, the widow of the intestate is a competent witness for the plaintiff, to prove the performance of the work and labor, when her testimony is not a disclosure of her husband's conversations or admissions, nor of matters the knowledge of which was acquired by her in conjugal confidence, nor of matters prejudicial to her husband's reputation. (*Stober's Admr. v. McCarter*, 4 *Ohio St. R.* 513. *Neil's Admr. v. Cherry*, 3 *West. Law Monthly*, 31. *Cook v. Grange*, 18 *Ohio R.* 526.)

When the husband has expressly or impliedly made his wife his agent, her declarations with regard to the matters within the scope of her authority, are admissible evidence against him. (*Riley v. Suydam*, 40 *Barb. R.* 222. *Casteel v. Casteel*, 8 *Black. [Ind.] R.* 240.)

In an action against husband and wife for a debt due by the wife *dum sola*, the plaintiff cannot prove admissions made by the wife during coverture respecting the debt. (*Brown v. Lasselle*, 6 *Black. [Ind.] R.* 147. *Brown v. Brown*, 8 *ib.* 221. *Ross v. Winners*, 1 *Halst. [N. J.] R.* 366.) And the declarations of either husband or wife are not generally evidence against the other. (*Johnson v. Sherwin*, 3 *Gray's [Mass.] R.* 374. *Lay Grae v. Peterson*, 2 *Sand. [S. C.] R.* 388. *Dean v. White*, 7 *Term R.* 108. *Turner v. Cove*, 5 *Conn. R.* 93. *Logan v. Link*, 4 *E. D. Smith's R.* 63.) If, however, the action is brought by the husband to recover for the services of his wife, her declarations may be given in evidence during service as to the terms of her employment. (*Hackman v. Ferry*, 16 *Penn. R.* 196.)

But the policy of the common law rule, that husband and wife cannot be witnesses for or against each other, has been very much questioned; and now, by the statutes of England, and of many of the American States, the testimony of husband and wife is admissible in many cases in which it was excluded by the rule of the common law.

Thus, in the State of New York, it is provided that in any trial or inquiry in any suit, action or proceeding, in any court, or before any person having by law or consent of parties authority to

examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall be competent and compellable to give evidence, the same as any other witness, on behalf of any party to such suit, action or proceeding; except that neither husband nor wife can give evidence for or against each other in any criminal action or proceeding, or in any action or proceeding instituted in consequence of adultery, or in any proceeding for divorce on account of adultery, except to prove the fact of marriage in cases of bigamy and charges of adultery; nor can either testify for or against the other in any action or proceeding for or on account of criminal conversation; and in no case can husband or wife be compelled to disclose any confidential communication made by one to the other during their marriage. (*Laws of 1867, ch. 887.*)

§ 214. In the State of California it is provided that a husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. This exception, however, is declared not to apply to an action or proceeding by one against the other. (*Wood's Dig. 1860, art. 1129.*)

There does not seem to be any reported decision at the present time (1867) giving a construction to this provision of the California statute; but it does not in *words* change or modify the common law rule upon the subject of the competency of husband and wife as witnesses for or against each other; and yet it may be *inferred* from the language of the statute that the husband and wife may by *consent* disclose any confidential communications between them during coverture; and that they may also testify for or against each other *generally* in an action or proceeding by one against the other. It is generally held, however, that in a matter so important to the peace and good order of families and the general policy of society, the common law rule upon the subject will not be regarded as changed except by express enactment.

In the State of Iowa, it is provided that the husband or wife shall in no case be a witness for or against the other, except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding of one against the other;

but they may in all criminal prosecutions be witnesses for each other. Neither husband nor wife, however, can be examined in any case as to any communication made by the one to the other while married; nor can they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted. (*Rev. Laws of 1860, part 3, ch. 159, §§ 3983, 3984.*)

In Kansas it is declared by statute that husband and wife are incompetent to testify for or against each other, or concerning any communication made by one to the other during the marriage, whether called as a witness while that relation existed or afterward; provided that when a suit is brought by or against husband or wife in his or her own right, and the other is joined as a mere nominal party, the party personally interested in the suit may be a witness upon the trial of the case. (*Comp. Laws of 1862, ch. 30, § 4.*)

In the State of Minnesota it is provided that neither husband nor wife shall be examined as a witness for or against the other without the consent of each other, nor can either be permitted, during the marriage or afterward, without the consent of the other, to testify as to any communication made by one to the other during the marriage, although this exception is declared not to apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other. (*Gen. Stat. 1858, ch. 84, § 53, sub. 1.*)

In Mississippi, the statute provides that in criminal cases, husband and wife shall be competent witnesses for each other. (*R. S. of 1867, ch. 61, art. 193.*)

In the new State of Nebraska, husband and wife are incompetent by statute to testify concerning any communication made by one to the other during the marriage, whether called as a witness while that relation subsists, or afterward, nor can they be examined or be permitted to reveal any such communication in any case; as they can in no case be witnesses for or against each other, except in a criminal proceeding for a crime by the one against the other, but they may in all criminal prosecutions be witnesses for each other. (*R. S. 1866, tit. 10, §§ 328, 331, 332.*)

In the State of Ohio, the statute provides that husband and wife are incompetent to testify for or against each other, or concerning any communication made by one to the other, during the marriage,

whether called as a witness while that relation subsisted or afterward, except in actions where the wife, were she a *feme-sole*, would be plaintiff or defendant; in which action the wife may testify. Either the husband or wife may testify, but not both. (2 *R. S. ch. 87*, § 314, *sub. 3*. *Vide also Mad River and Lake Erie R. R. Co. v. Fulton*, 20 *Ohio R.* 318. *Cook v. Grange*, 18 *ib.* 526, 531. *Stober's Admr. v. McCarter*, 4 *Ohio St. R.* 513. *Nusee v. Beach*, 15 *ib.* 172.)

In the State of Oregon, the statute upon this subject is in all respects like that upon the same subject in the State of Minnesota, with this alteration, that "in a criminal action or proceeding, a husband or wife cannot be a witness for or against each other, except when the crime was committed by or against the other." (*General Laws of 1864, Civ. Code, tit. 3, ch. 8, § 702, sub. 1. And Crim. Code, ch. 22, § 212.*)

In the State of Indiana, husband and wife are incompetent witnesses for or against each other, and they cannot disclose any communication from one to the other, made during the existence of the marriage relation, whether called as a witness while the relation exists or afterward. (2 *R. S.* 1852, *part 2, ch. 1, § 290. Vide also Weisler v. Probasco*, 7 *Ind. R.* 690. *Robertson v. Caldwell*, 9 *ib.* 515. *Jack v. Russey*, 8 *ib.* 180. *Carpenter v. Dane*, 10 *ib.* 128. *Woolley v. Turner*, 13 *ib.* 253. *Lapreese v. Falls*, 7 *ib.* 692.)

Under the statutes of Indiana, husband and wife are competent to testify after the marriage relation ceases to exist, as to any thing the knowledge of which was not attained through the privacy of the marriage relation. (*Woolley v. Turner, supra. Carpenter v. Dane, supra.*)

In a suit for the seduction of the plaintiff's wife, her statements are not competent evidence for the defendant. (*Harris v. Russell*, 14 *Ind. R.* 209.)

It may be suggested that in several of the states the statutes provide that no person shall be excluded as a witness in any case on the ground of interest, but the rule that husband and wife are incompetent, at common law, to testify for or against each other, is not changed by these statutes. Whether the husband and wife be parties to the action, or only interested in the event, the policy of the rule applies. (*Bird v. Hulston*, 10 *Ohio St. R.* 418. *Hsbrouck v. Vandervoort*, 9 *N. Y. R.* 153. *And vide Marsh v.*

Potter, '30 *Barb. R.* 506. *Main v. Stephens*, 4 *E. D. Smith's R.* 86.)

§ 215. With respect to the rule at common law which disqualifies husband and wife from entering into covenants with each other, it may be suggested that the rule is so rigid that no agreement between them will be recognized as removing the disabilities resulting from the marital relation, or as changing the legal capacities or characters of either party. It has been sought in some instances to give effect to a deed of separation, but the attempt is answered by reference to the acknowledged principle that the contract supposed was made between two persons who were but one in law, and unable for that reason, to contract with each other, and that the foundation therefore failed upon which the deed is sought to be sustained. It was said by Lord Kenyon, in such a case, that, if it were otherwise, "and the parties were competent to contract at all, it would then become material to consider how far a compact would be valid, which had for its object the contravention of the general policy of the law in settling the relations of domestic life, and which the public is interested to preserve; and which, without dissolving the bond of marriage, would place the parties in some respects in the condition of being single, and leave them in others subject to the consequences of being married; and which would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character." (*Marshall v. Rutton*, 8 *Term R.* 545.)

The same doctrine is recognized and sanctioned by the American courts. (*Beach v. Beach*, 2 *Hill's [N. Y.] R.* 260. *Cropsey v. McKinney*, 30 *Barb. [N. Y.] R.* 47.)

A deed from the husband to the wife without consideration, is void both at law and in equity. The legal title in such a case remains still in the husband. The relation of the parties *inter se*, renders them incompetent to convey the legal title to real estate directly from the one to the other. Such a conveyance from the husband to the wife, if founded upon a sufficient consideration, may be upheld in equity. (*Fowler v. Trebein*, 16 *Ohio St. R.* 493.)

A tripartate deed of trust and separation, executed by the husband and wife, but not executed by the trustee, is binding on no one, but is held to be absolutely void. (*Smith v. Knowles*, 2 *Grant's [Pa.] Cases*, 413.) And it has been held in general terms that contracts between husband and wife are contrary to the policy

of the law, and are null and void. (*Simpson v. Simpson*, 4 *Dana's [Ky.] R.* 141.)

When these covenants are made with third persons as trustees, for the benefit of the parties, they are sometimes sustained in a court of equity, and the doctrine of equity as to enforcing such covenants will be adverted to hereafter.

A married woman, at common law, cannot convey to her husband, by deed, her dower right in his real estate, upon this same principle of their mutual disability, and also upon the legal presumption that the wife is *sub potestate viri*—"under the control of her husband." (*Graham v. Van Wyck*, 14 *Barb. R.* 531.) The wife is presumed to act under the influence of her husband, but it is proper to remark that the husband is never presumed to act under the influence of his wife (*City Council v. Roven*, 2 *McCord's [S. C.] R.* 465); so that this principle does not enter into the rule which disqualifies the husband, in general, from binding himself by his contracts or covenants to his wife.

An indenture between husband and wife, after their marriage, by which the husband purports to give the wife authority to use, and dispose of by will, personal property acquired after the marriage, and the rents and profits of real estate so acquired, referring to an antenuptial agreement, whereby the husband had agreed that his wife might dispose of a certain amount of money by will, and averring the intention of thus including personal property acquired by the wife after marriage, is not binding, and will not authorize the wife to devise and bequeath her property. (*Osgood v. Breed*, 12 *Mass. R.* 525.) A post-nuptial agreement between husband and wife, by which property is set apart for the separate use of the wife, is absolutely void at law, although it may sometimes be sustained in equity. (*Bleeker v. Bingham*, 3 *Paige's Ch. R.* 246.) So gifts, between husband and wife, without the intervention of trustees, are absolutely void at law, but are sometimes sustained in equity. (*Elms v. Hughes*, 3 *Dessau. [S. C.] R.* 158.)

It has been held, however, by the superior court of the city of New York, that when the husband draws a bill of exchange, payable to the order of his wife, her indorsement of the bill gives the indorser a title, which enables him to recover upon it against the acceptor. Barbour, J., said: "It is true that, by the common law, which, in that regard, must control in this case, a husband and his

wife are, in general, incapable of contracting with each other so as to create a right of action in favor of the one as against the other. But a bill of exchange is not merely a contract between the drawer and the payee. It is, when accepted, a new contract between the acceptor and the then holder, who, in this case, was the indorser of the wife; nor is such a bill always a contract, as between the drawer and the person to whom or to whose order it is payable. It may be made payable to the order of the drawee himself, or to some one receiving the same for collection for the benefit and use of the drawer; or, what is a very common occurrence in commercial communities, it may be payable to the order of some person who indorses it simply for the accommodation of the maker. In none of those cases is there any contract which can be enforced by the payee named in the bill against the maker. In each instance it is a mere direction to pay, and has no validity whatever, as an obligation, until indorsed to a *bona fide* purchaser or acceptor." (*Lee Bank v. Satterlee*, 1 *Robertson's R.* 1, 4, 5.)

An agreement between husband and wife that they will live apart, and the husband shall secure a separate maintenance to his wife, through the intervention of trustees, and she shall not be further chargeable to him, is void, and cannot be enforced. (*Goodwin v. Goodwin*, 4 *Day's [Conn.] R.* 343.) These are all in accordance with the rules of the common law, but the common law rule has been greatly changed or modified by the statutes of many of the states, and these will be noticed hereafter.

CHAPTER XIX.

LIABILITIES OF THE HUSBAND BY THE MARRIAGE—HIS LIABILITY DURING COHABITATION—HIS LIABILITY AFTER SEPARATION—HIS LIABILITY FOR THE TORTS AND CRIMINAL ACTS OF THE WIFE.

§ 216. IN consequence of the rights which the husband acquires over the person and the property of his wife, there are certain liabilities which he incurs on her account, and by considering these liabilities we are enabled the more readily to comprehend the nature of the disability incident to a state of coverture.

The rule of the common law throws upon the husband the burden of his wife's debts contracted by her *dum sola*, whatever their amount, and makes him liable for them during coverture; this is the rule although the wife do not bring to the husband a portion of a single shilling. (*Heard v. Stamford*, 3 P. Wms. R. 409. *Welden v. Welden*, 7 Ohio St. R. 30. *Buckner v. Smyth*, 4 Dessau. [S. C.] R. 371.) And this is the rule even though the husband was an infant at the time the marriage was consummated and the suit commenced, and this liability is held to be incident to the marriage contract which an infant is competent to enter into. (*Parish v. Stroud*, Barnes' Notes, 95. *Roach v. Quick*, 9 Wend. [N. Y.] R. 238. *Butler v. Breck*, 7 Metc. [Mass.] R. 164.) It has been held that the husband is liable for the debts contracted by his wife while she was the wife of a former husband, and living separate from him, with a separate maintenance, because in such case she became liable upon her contracts and could be sued the same as though she was sole. (*Corbett v. Poelnitz*, 1 Term. R. 5. *DeGaillou v. L'Aigle*, 1 Bos. & Pull. R. 357.) The later authorities, however, hold that the wife cannot be sued at common law, as a *feme-sole*, while the coverture continues. (*Beard v. Webb*, 2 Bos. & Pull. R. 93. *Marshall v. Rutter*, 8 Term. R. 545.) And in a still later case, it was held that no agreement between husband and wife can alter the state of liability and non-liability which the law imposes upon each. (*Nurse v. Craig*, 5 Bos. & Pull. [2 New.] R. 148.) The better opinion therefore is, that, as to the wife's debts before marriage, the husband is only liable to pay the debts of his wife contracted *dum sola*, and for all such he is liable. He is in no case responsible for those debts of the wife for which she was not legally liable at the time of the marriage. (*Cowley v. Robertson*, 3 Camp. R. 438. *Caldwell v. Drake*, 4 J. J. Marsh. [Ky.] R. 246.) And according to Clancy, the rule is confined to the wife's engagements contracted while she was unmarried; for if they were made during a former marriage, her subsequent husband cannot be responsible for them, as she was, at that time, incapable of entering into any contract. (*Clancy on Married Women*, 13.)

The principle upon which the husband is liable for the debts of his wife contracted *dum sola*, is not that he received property by her, for the circumstance of his having received property from her does not increase his liability, nor the fact that he received no

property by her diminish such liability. Nor is this liability of the husband based upon the idea that he is a debtor; but the real ground of this liability is, that the wife by her marriage, is entirely deprived of the use and disposal of her property, and can acquire none by her industry. The personal property of the wife passes absolutely to the husband, and he is also entitled to the use of her real estate during coverture, and her person, labor and earnings, belong unqualifiedly to him. This affords a very substantial reason for the husband's liability for his wife's debts contracted before coverture. (*Vide Reeves' Domestic Relations*, 3.)

§ 217. The responsibility of the husband for the debts of the wife, contracted while she was a *feme-sole*, as it originates in the marriage, ceases with it; or the liability continues only so long as the marriage, and if the wife die before the demand has been recovered from the husband, he is discharged from any further liability. This is the rule, although the husband may have received a large fortune with his wife, and his liability is the same if he had received nothing with her. (*Heard v. Stamford*, 3 P. Wms. R. 409. *Tyler v. Lake*, 4 Sim. R. 150. *Chapline v. Moore*, 7 Mon. [Ky.] R. 179. *Jones v. Walkup*, 5 Sneed's [Tenn.] R. 135. *Thaeton v. Houseal*, 2 McCord's [S. C.] Ch. R. 430. *Tabb v. Boyd*, 4 Call's [Va.] R. 453. *Buckner v. Smith*, 4 Dessau. [S. C.] R. 341. *Randolph v. Simpson*, 2 Halst. [N. J.] R. 346. *Neutz v. Reuter*, 1 Watt's [Pa.] R. 229. *Howes v. Bigelow*, 13 Mass. R. 384. After the death of the wife, the husband cannot be made liable in equity for debts contracted by her before marriage, when judgment has not been recovered against him in her life-time, although he received with her a fortune sufficient to pay all her debts. In this respect the rule is the same in equity as at law. (*Witherspoon v. Dubose*, 1 Bailey's [S. C.] Eq. R. 167.)

In an action for the debt of the wife *dum sola*, the husband and wife must be joined as parties defendants, and the plaintiff will be nonsuited if he bring the action against the husband alone. (*Angel v. Felton*, 8 Johns. [N. Y.] R. 149. *Gage v. Reed*, 15 ib. 403. *Robinson v. Hardy*, 1 Keb. R. 281. *Drue v. Thorn*, Alley's R. 72. *Mitchsen v. Heuson*, 7 Term R. 348.) And a judgment against the husband alone for such a demand will be reversed on error. (*Gray v. Thacker*, 4 Ala. R. 136.)

In an action against husband and wife for the debt of the wife *dum sola*, the declaration must state the relation of husband and

wife in order to admit evidence of a promise by the husband to pay the demand, and should also specify whether the promise relied upon was made before or after marriage. (*The People v. Oneida Com. Pleas*, 21 *Wend.* 20. *Francis v. White*, 39 *Eng. C. L. R.* 626.) No joint promise between husband and wife, however, should be alleged, for the reason that the wife's promise, at common law, is void. (*Morris v. Norfolk*, 1 *Taunton's R.* 212. *Edwards v. Davis*, 16 *Johns. R.* 281.) In any action against husband and wife for the debt of the wife while sole, the suit abates if the wife die before the declaration is filed. (*Williams v. Kent*, 15 *Wend. R.* 360.) And in such a case, if the cause come to trial, the admissions of the wife, made after marriage, that the debt accrued *dum sola*, are not admissible in evidence to charge the husband. (*Ross v. Winners*, 1 *Halst. [N. J.] R.* 366. *Shepherd v. Starkie*, 3 *Munf. [Va.] R.* 29. *Brown v. Lasalle*, 6 *Black. [Ind.] R.* 147.)

In an action against husband and wife for a debt due by the wife *dum sola*, presumptive evidence of the marriage is sufficient. (*Tracey v. McArilton*, 7 *Dowl. R.* 533. *Dacey v. McCarter*, 3 *Jur.* 124.)

An action will lie against husband and wife for slanderous words spoken by the wife before marriage. (*Hank v. Harman*, 5 *Binney's [Pa.] R.* 43.)

The rule is well settled, that at common law, on the espousal of a damsel, she is taken with all her slanders on her head, and all her trespasses, and her husband is answerable for them. It is, however, to the credit of the sex, that there is very seldom occasion in this country to pursue the husband for the slander or breaches of the peace of his wife *dum sola*. But by the marriage the husband assumes all the liabilities to which his wife is subject at the time of the marriage, including her debts, breaches of trust, trespasses, slanders and libels. (*Palmer v. Wakefield*, 43 *Eng. Ch. R.* 227, 233.)

§ 218. Although the husband is not answerable as such after the death of his wife, for her debts contracted *dum sola*, in consideration of any personal property he has received with her, nevertheless, if property belonging to the wife vests in him, not in his marital right, but as administrator of his wife, he is liable to the extent of her assets; for since he cannot recover her property outstanding at her death, except as her administrator, such property will, as in ordinary cases, be assets to pay her debts. (*Heard v. Stamford*, 3

P. Wms. R. 409. *Adair v. Shaw*, 1 *Sch. & Lef.* 263. *Jones v. Walkup*, 5 *Sneed's [Tenn.] R.* 135.) In these cases, when the husband is sued as the administrator of his wife, to recover debts due from the wife *dum sola*, the court will decree payment to the extent of what the husband has received since his wife's death as her administrator, and he will be declared liable for so much only. If, however, the husband make a settlement upon the wife, in consideration of his wife's fortune, which is expressly secured to him it would not be subject to her debts *dum sola*, not being collected during coverture. In that case the creditor would be remediless unless he collect his debt during the life of the wife. (*Mitford v. Mitford*, 9 *Ves. R.* 87.)

The bankruptcy of the husband does not take away the right of the wife's creditors *dum sola* to look for payment to her property, which has been fraudulently conveyed away; nor will his discharge in bankruptcy destroy the creditor's right to enforce the debt against the property of the wife. (*Hamlin v. Bridge*, 24 *Maine R.* 145.)

It may be remarked that the husband administrator upon his deceased wife's estate is not accountable to her *heirs* for the assets, although he have a balance in his hands. Such assets belong absolutely to the husband. (*Clay v. Irvine*, 4 *Watts & Serg. [Pa.] R.* 232. *Whitaker v. Whitaker*, 6 *Johns. [N. Y.] R.* 112.)

The husband is entitled to administer upon the intestate wife's estate, and takes all her personal property, after payment of her debts; and he cannot, of course, be cited to account by her next of kin. This is the rule at common law, and always prevails unless expressly changed by statute. (*Shumway v. Cooper*; 16 *Barb. R.* 556.) If the husband, without taking out letters of administration, obtain possession of his wife's personal property, he may retain it against his wife's next of kin; and if administration be granted to a third person, the administrator of the wife is trustee to the husband. (*Whitaker v. Whitaker, supra.*) But more of this hereafter.

The husband is liable for a devastavit committed by his wife *dum sola*; that is, whatever assets came to her hands as the personal representative of a deceased person, and were wasted by her previous to the coverture, he is chargeable with as for her debt during coverture. (*Adair v. Shaw*, 1 *Sch. & Lef.* 263, 267. *In re McWilliams*, 1b. 172. *Carroll v. Cannott*, 2 *J. J. Marsh. [Ky.] R.*

199. *Phillips v. Richardson*, 4 *ib.* 215. *Graves v. Downey*, 3 *Mon.* [Ky.] *R.* 355. *Chaplin v. Simmons*, 7 *ib.* 339. *Moore v. Henderson*, 4 *Dessau.* [S. C.] *R.* 459. *Know v. Pickett*, *Ib.* 92. *Gratz v. Phillips*, 1 *Penn. R.* 333.) So also the husband is liable for the acts of his wife before coverture as executrix *de son tort*, that is, "of her own wrong." (*Hubble v. Fogertie*, 3 *Rich.* [S. C.] *R.* 413.) But here again the rule comes in that the husband must be prosecuted during coverture, for he is not liable for the devastavit of his wife committed before marriage. (*Maffit v. Commonwealth*, 5 *Barr's* [Pa.] *R.* 359. *Elliot v. Lewis*, 3 *Edw.* [N. Y.] *Ch. R.* 40, 45.) However, if judgment be had against husband and wife for a devastavit by the wife as executrix *dum sola*, and she die before execution issues, it may be executed against the husband after her death. (*Eyre v. Coward*, 1 *Sid. R.* 337.)

If the husband dies before the wife's debt is recovered, the wife surviving is liable for the debt. (*Woodman v. Chapman*, 1 *Camp. R.* 189.) But it has been held that the wife surviving is not liable in such case, if the husband, during coverture, obtained a certificate in bankruptcy, for the certificate discharges the wife's debts as well as his own. (*Lockwood v. Salter*, 27 *Eng. C. L. R.* 82. *Miles v. Williams*, 1 *P. Wms. R.* 249.) On the contrary, it has been held in the State of New York, that the discharge of the husband in bankruptcy does not discharge the wife, the court of appeals holding that the bankruptcy of the husband extinguishes the liability as to him; but it revives against the wife if she survive her husband. (*Vanderheyden v. Mallory*, 1 *N. Y. R.* 452.) This is, undoubtedly, the true rule in equity, however the rule may be at law.

§ 219. If a judgment be recovered against the wife previously to her marriage, for her debt while single, and she die before the execution is sued out, the husband will be discharged from the demand. But if the demand be sued after marriage, and a judgment is recovered against both husband and wife, and the wife dies before execution, the husband will continue charged for the demand; because by the judgment the nature of the debt was altered, and from that time it became his own debt. (*O'Brian v. Ram*, 3 *Mod. R.* 186. *Eyre v. Coward*, *supra.* *Treiban v. Lawrence*, 2 *Ld. Raym. R.* 1050.) And for the same reason, if judgment be recovered against the wife while sole, and a *scire-facias* be brought upon the judgment after the marriage against both husband and wife,

and a judgment be obtained on the *scire-facias*, the husband will not be discharged after the wife's death. This is, manifestly, the doctrine as laid down in an early English case, though differently understood by Mr. Bright, as stated in his treatise on the Rights of Husband and Wife. (*O'Brian v. Ram*, 3 *Mod. R.* 186. 2 *Bright's Hus. and Wife*, 3.) But the husband is liable if the demand is put into judgment during coverture, though not collected until after the death of the wife; and as a *scire-facias* is treated as a new action, and in cases where other parties than those named in the original judgment became interested in the execution of the judgment, as by marriage, the *scire-facias* is resorted to, to make the new person a party to the judgment, the husband will become bound by the judgment originally entered against the wife. It is very clear, therefore, that the judgment entered against the husband and wife upon *scire-facias* brought upon the judgment against the wife while sole, will bind the husband, though no execution issue until after the death of the wife, and the husband will still continue to be charged. So, also, a judgment recovered against the husband for the debt of his wife *dum sola*, may be enforced against his estate after his death, and a *scire-facias* may issue against his executor: (*Burton v. Burton*, 5 *Harring. [Del.] R.* 441.)

§ 220. The statutes of several of the states have changed the liability of the husband with respect to the debts of his wife existing at the period of the marriage. Thus, in the State of New York, it is provided by statute that an action may be maintained against the husband and wife, jointly, for any debt of the wife contracted before marriage, but the execution on any judgment in such action can only issue against, and such judgment will only bind, the separate estate and property of the wife; except that when the husband acquires the separate property of his wife, or any portion thereof, by any antenuptial contract, or otherwise, he is made liable for the debts of his wife contracted before marriage, to the extent only of the property so acquired. (*Laws of 1853, ch.* 576. 4 *Stat. at Large*, 514, 515.)

In the State of Maine, the property of the husband cannot be taken in execution upon a debt contracted by his wife before marriage, but the property of the wife is alone liable for such debts. (*Laws of 1852, ch.* 291. *R. S.* 1857, *tit.* 5, *ch.* 61, § 4.)

In the State of Massachusetts, it is expressly provided by statute, that the property of the wife is alone liable for her antenuptial

debts. (*Laws of 1855, ch. 304. Gen. Stat. 1860, ch. 108, § 8.*) The law is the same in Pennsylvania. (*Purdon's Dig. of 1861, pp. 669, 670, § 14. LeFevre v. Witmer, 10 Penn. R. 505.*)

In the State of New Hampshire, it is provided by statute, that in case the wife dies intestate, the husband shall take all of her personal property subject to her debts, contracted both before and after marriage. (*Comp. Laws, tit. 18, ch. 159, § 17.*) In the State of Connecticut, the husband is not liable for the antenuptial debts of his wife. (*Gen. Stat. 1866, tit. 13, ch. 2, § 31.*)

In the State of Georgia, the property of the husband is not liable for the antenuptial debts of his wife, further than the property received by him through his wife will satisfy such debts. (*Laws of 1855, 1856, tit. 19, § 176, p. 229.*)

In Florida, the property of the wife alone is liable for her debts contracted before marriage, or for any antenuptial obligation. (*Thompson's Dig., 2 div., tit. 5, ch. 1, § 2.*) And the same is the law in Alabama. (*Code of 1852, § 1981.*)

In the State of Mississippi, the husband cannot be made liable for the antenuptial debts of his wife, until her separate property is exhausted. (*Hutch. Code, ch. 34, art. 7, § 8. R. S. of 1857, ch. 40, art. 25.*)

In the State of Kentucky, the separate estate of the wife is alone liable for her antenuptial debts and obligations, except that the husband may be made liable for such debts to the extent only of the personal property which he may receive through her. (*2 R. S., ch. 47, art. 2, §§ 1, 3.*)

In the State of Indiana, the husband is liable for the debts and obligations of his wife contracted before marriage, only to the extent of the wife's property, and this liability continues after the wife's death. (*2 R. S. 1862, ch. 77, §§ 1, 2.*)

In Missouri, the property of the husband, owned before marriage, or acquired afterward by descent, gift, grant, or devise, and the use and profits of it are not liable for the antenuptial debts of his wife. (*Laws of 1849, pp. 67, 68.*)

In the new State of Nevada, the separate property of the husband cannot be reached for the debts of his wife, contracted before marriage. (*Laws of 1864, 1865, ch. 76, § 13.*)

In the State of California, the separate property of the wife is alone liable for her antenuptial debts; and in an action brought to recover such debts, the husband need not be joined with the

wife as a party defendant. (*Comp. Laws* 1853, *ch.* 147, *p.* 812. *Bostie v. Love*, 16 *Cal. R.* 69.)

It is probable that similar provisions exist with respect to the antenuptial debts of the wife, in some of the states not here mentioned; but if there are, the statutes must have been passed quite recently.

§ 221. Every man is under obligation by the common law to supply his wife with necessaries, suitable to his degree and circumstances, and if he neglects this duty, the law affords a remedy. The wife in such case may have recourse to any friend for necessaries, and the husband is bound to pay for them; for when the law imposes a duty, it raises a promise on the part of the person upon whom it is imposed to discharge it. It is a settled principle in the law of husband and wife, that, by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is bound for the supply of necessaries to the wife, so long as she is not guilty of adultery or elopement. (*Vide Cromwell v. Benjamin*, 41 *Barb. R.* 558.) The plea of infancy of the husband is no answer to a claim for necessaries furnished to the wife, as a minor is liable in such a case the same as an adult. (*Contine v. Phillips*, 5 *Harrington's [Del.] R.* 428. *Cole v. Seeley*, 25 *Vt. R.* 220.)

The husband is bound by the contracts of his wife, for ordinary purchases, from a presumed assent on his part, but, if his dissent be shown, the presumption, of course, is rebutted, and then he is not liable, unless the seller shows the absolute necessity of the purchase for her comfort. (*Etherington v. Parrott*, 1 *Salk. R.* 118.) And this doctrine is fully recognized in this country, and is believed to be founded on correct principles of justice. (*Therriott v. Bangioli*, 9 *Bosw. R.* 578.) Therefore, in these cases, if it appear that the husband has given notice not to sell to his wife on his account, a subsequent promise to pay by the husband must be shown, or that the goods furnished were actually necessary, in order to make him liable.

So long as the parties cohabit as husband and wife, the husband is liable for the necessaries of his wife, suitable to his degree and estate; and the misconduct, or even adultery, of his wife, in that situation, does not excuse him from the liability. The wife possesses no original power to bind the husband for her necessaries; but, the very circumstance of cohabitation, and from the goods

being consumed in his house, the law implies the assent of the husband to the wife's contracts for such necessaries. (*Etherington v. Parrott*, 1 *Salk. R.* 118 The rule of law is, that "the husband will be liable when the goods purchased by her (to the payment for which he would not be liable) come to her or his use with his knowledge and permission, or where he allows her to retain and enjoy them." (2 *Bright's Hus. & Wife*, 9. *Ogden v. Prentice*, 33 *Barb. R.* 160, 164.)

It is asserted that the power of the wife to bind the husband, on any of her contracts, is based on the sole ground of agency, for the reason that the wife, *as such*, has no original and inherent power to make *any* contract, even for necessaries, binding on the husband. (*Benjamin v. Benjamin*, 15 *Conn. R.* 347.) And, unless the contract was originally made with his assent, express or implied—that is, express or implied in *law*, or from certain facts, or was subsequently adopted by him—he cannot be made liable. (*Lane v. Ironmonger*, 13 *Mees. & Wels. R.* 368. *Freestone v. Butcher*, 38 *Eng. C. L. R.* 269.)

Cohabitation is so strong evidence of the assent of the husband, as to have been held sufficient to make him liable for *necessaries* furnished the wife, although the parties were not legally married, and the tradesman knew it, the husband being liable for the debts of his wife during coverture, if the relation of husband and wife was only *de facto*. (*Watson v. Tralkeld*, 2 *Esp. R.* 627. *Robinson v. Nahon*, 1 *Camp. R.* 245. *Munro v. DeChemant*, 4 *ib.* 215. *Blades v. Free*, 17 *Eng. C. L. R.* 351.)

§ 222. With respect to the liability of the husband for necessaries furnished to his wife, Mr. Story states the rule, "that when the husband and wife live together, or when they live separate for any other cause than adultery, and the husband does not grant to the wife an adequate allowance, he is bound to furnish her with necessaries. And if he omit to furnish them, he impliedly makes her his agent to procure them for herself, nor can he avoid his liability therefor by a general prohibition to all persons, his prohibition in such case being considered as merely void. When, therefore, 'necessaries' are furnished to the wife, whether the husband knows of it or not, the law raises an uncontrollable presumption of an assent and authorization thereto on his part." (*Story on Con.* § 27.)

If Mr. Story means to say, in the last preceding sentence, that the husband can never avoid paying for articles furnished his wife,

merely because they were necessities, suitable to his and her estate and degree, and because they cohabited together, he has stated the rule much stronger than the authorities will justify. Cohabitation is strong evidence of the assent of the husband to the contract of his wife for necessities, but it is not conclusive; and the presumption which arises from that fact may be rebutted. The husband may show in his defense in such a case, that he supplied his wife himself, or that he did so by his agents, or that he gave her ready money to make the purchases. (*Manly v. Scott*, 1 *Sid. R.* 109.)

Lord Holt, in a case before referred to, says: "While they cohabit, the husband shall answer all contracts of hers for necessities; for his assent shall be presumed to all necessary contracts, upon the account of cohabiting, unless the contrary appears." And he held the presumption rebutted in that case, by the fact that notice had been given the particular tradesman not to trust his wife on his account. (*Etherington v. Parrott*, 1 *Salk. R.* 118.)

In another English case where it appeared that the parties were not separated, and the goods were necessities, Holroyd, J., says: "If a husband supplies his wife with money sufficient for the purchase of necessities, he is not liable for any debt contracted by her for necessities, to a party who has notice of this allowance." (*Holt v. Brien*, 6 *Eng. C. L. R.* 418.)

In the supreme court of the State of New York, Platt, J., said: "The duties of the wife, *while cohabiting with her husband*, form the consideration of his liability for her necessities. He is bound to provide for her, *in his family*; and while he is guilty of no cruelty toward her, and is willing to provide her a home, and all necessities *there*, he is not bound to furnish them elsewhere." And again: "Cohabitation is evidence of the husband's assent to contracts made by his wife, for necessities, and it can be repelled only by express notice of previous dissent, or notice not to trust her." (*McCutchen v. McGahay*, 11 *Johns. R.* 281, 282.)

§ 223. It is doubtless true, that during cohabitation, the husband is bound to provide for his wife a suitable support, and if he does not do it, he is legally liable for necessities furnished to her by tradesmen, even though such necessities are furnished against his positive orders. By omitting to furnish his wife with necessities, the husband makes her impliedly his agent to purchase them. (*Seaton v. Benedict*, 15 *Eng. C. L. R.* 355.) This, however, is altogether

a different proposition than to affirm that the husband is *uncontrollably* bound to pay for whatever his wife takes up, and is liable on her contracts, merely because they were cohabiting, and the articles furnished were necessary and suitable in quantity and quality. Cohabitation is strong presumptive evidence of authority to purchase necessities, but is no evidence of authority to purchase other articles not suitable to his estate and degree, or the station which he permits his wife to assume; and without some other evidence of the husband's assent, than mere cohabitation, no action can be maintained. (*Morton v. Withins, Skin. R.* 349. *Montague v. Benedict*, 10 *Eng. C. L. R.* 205. *Montague v. Espinasse*, 11 *ib.* 416, 454. *Spreadbury v. Chapman*, 34 *ib.* 434. *Atkins v. Carwood*, 32 *ib.* 21.)

Slight circumstances have been held sufficient in some cases to charge the husband for articles not suitable to his wife's real degree; as, if he knowingly permit her to assume an appearance beyond that degree. (*Waithman v. Wakefield*, 1 *Camp. R.* 120.) The mere fact, however, that the husband had seen the articles, will not charge him, when it appeared that he had disapproved of their purchase. (*Atkins v. Carwood, supra.*)

If the tradesman originally gave the credit to the wife, although cohabitation continued, the husband is not chargeable, whether the articles were necessities or not. (*Bentley v. Griffin*, 1 *Eng. C. L. R.* 131. *Metcalf v. Shaw*, 3 *Camp. R.* 22. *Moses v. Forgartie*, 2 *Hill's [S. C.] R.* 335. *Sweet v. Penrice*, 24 *Miss. R.* 416.) When a physician renders professional services to a married woman at her request, and expressly upon her credit, while she is living apart from her husband, the supreme court of Vermont held that the rule was clear that he could not afterward recover in *assumpsit* against the husband. (*Carter v. Howard*, 6 *Am. Law Reg. N. S.* 411.) In this case the separation between the husband and wife was voluntary on the part of the wife, though not an adulterous elopement, and it is probable, therefore, that the physician could have recovered of the husband for his services, had the same been done upon his credit. (*Vide Day v. Burnham*, 36 *Vt. R.* 37. *Black v. Bryan*, 18 *Texas R.* 453.)

When a wife having a separate income, purchased solely upon her own credit, suitable furniture for a house held for her by trustees and occupied by herself and her husband, and subsequently died, having bequeathed the furniture to her husband, the supreme

court of New Hampshire held that the vendor, who had thus sold the furniture to her with knowledge of the facts, could not recover for it of the husband in *assumpsit*. (*Hill v. Goodrich*, 6 *Am. Law Reg. N. S.* 250.) And in a case in the supreme court of the State of New York, where it appeared that a *feme-covert* had a separate estate vested in a trustee, and services were rendered on the estate, and the credit given to her, the court held that the husband was not liable, the judge who delivered the opinion remarking: "There is no equitable or legal consideration on which his liability can be sustained when the credit was given exclusively to the wife." (*Stammers v. McComb*, 2 *Wend. R.* 454.)

If a wife contract for necessaries, or for goods that go to the use of the husband, the law presumes the wife to be his agent, and he will be made liable to pay for the articles purchased. (*Williams v. Cowan*, 1 *Grant's [Penn.] Cases*, 21. 2 *Phil. R.* 70. 6 *Am. Law Reg.* 315. *Vide also* *McGeorge v. Egan*, 7 *Scott's R.* 112. *Plimmer v. Sills*, 3 *Nev. & Man. R.* 422.)

When a husband lives with his wife, and has paid bills created by her, his estate is liable for goods suitable to his condition in life, bought by her without his order, and received in his house a few hours before his death, and partly used before that time and at his funeral, although the wife had separate property, and sometimes paid bills with it. (*Sterling v. Potts*, 2 *South. [N. J.] R.* 773.) But it seems that the husband's executor is not bound to pay for goods supplied to the wife after her husband's death, although before information of his death has been received. (*Blades v. Free*, 17 *Eng. C. L. R.* 351.) And as, in such a case, the wife is not liable, it follows that the tradesman who supplied the goods is remediless. (*Smart v. Ilbury*, 10 *Mees. & Wels. R.* 1.)

But the estate of a deceased husband is subject to the funeral charges of his wife, though she had a separate maintenance which she disposed of by will. (*Etherington v. Parrott*, 1 *Salk. R.* 119. *Gregory v. Lockyer*, 6 *Madd. Ch. R.* 90.)

§ 224. The husband is not liable as husband for money borrowed by his wife, even though the money be applied to the purchase of necessaries, or to the redemption of the wife's clothes that have been pawned. Neither is the husband liable if the wife take up goods, and, before they are made into clothes, pawns them; though the rule is otherwise if the clothes are made up and worn and then pawned, for in that case the husband may be liable. In these

cases the husband cannot be made liable unless his request be averred and proved, or there be circumstances to show that the wife contracted the debt as the agent of her husband. (*Earle v. Peale*, 1 *Salk. R.* 387. *Etherington v. Parrott*, *Ib.* 118. *Anonymous*, 2 *Show. R.* 283, 290. *Stone v. McNair*, 2 *Eng. C. L. R.* 166. *Stevenson v. Hardy*, 3 *Wils. R.* 388. *Walker v. Simpson*, 7 *Watts & Serg. [Penn.] R.* 83.) The husband can in no case be made liable upon the contract of the wife if the same be illegal; for example, it is ruled that the husband is not liable for diet and lodging furnished his wife in a prison, unless he assented to it. (*Fowler v. Dyneley*, 2 *Str. R.* 1122.)

The rule in equity is different from that at law, when the wife borrows money without the express authority of the husband, and actually expends it for the purchase of necessaries. In equity, in such a case, the lender of the money will be allowed to stand in the place of the tradesman, and to have satisfaction as far as the tradesman could had he been plaintiff. (*Harris v. Lee*, 1 *P. Wms. R.* 482. *Walker v. Simpson*, *supra*.)

Upon the same principle that cohabitation is presumptive evidence of the authority of the wife to contract for necessaries, a man is liable for the debts incurred for necessaries by a woman with whom he cohabits, holding her out to the world as his wife, though of right she may not be his wife; that the relation of husband and wife exists *de facto* is sufficient to fix the reputed husband for such debts during coverture. (*Robinson v. Nahan*, 1 *Camp. R.* 245. *Munro v. DeChemant*, 4 *ib.* 215. *Watson v. Threlkeld*, 2 *Esp. R.* 637. *Blades v. Free*, 17 *Eng. C. L. R.* 351.)

So, also, when a man, being already married, marries to a second woman, he will be liable for necessaries furnished to the second wife during their cohabitation, and he cannot discharge himself from the obligation by proof of the former marriage. (*Robinson v. Nahan*, *supra*.) But if it could be proved that the plaintiff knew of the celebration of the first marriage, it would be a bar to the action. (*Ib.*)

At common law, the husband alone is liable for necessaries furnished to the wife during coverture, and in an action therefor to recover for the same, the wife ought not to be joined. (*Main v. Stephens*, 4 *E. D. Smith's R.* 86.) In the State of Pennsylvania, however, they have a statute providing that in cases of necessaries furnished for the family of a married woman, an action may be

brought therefor against the husband and wife, and if judgment is recovered, an execution may issue thereon against the property of the husband, and if the execution is returned unsatisfied, an alias execution may issue against the property of the wife. (*Purdon's Dig.* p. 700, § 13.) Under this statute, in order to hold the wife, the debt for the necessities must have been contracted by her. (*Murray v. Keyes*, 35 *Penn. R.* 384. *Parke v. Kleber*, 37 *ib.* 251.) They have a similar statute in the State of Texas. (*Vide Magee v. White*, 23 *Texas R.* 180.)

Thus much for the liability of the husband upon the contracts of the wife for necessities, and the presumptions of law during cohabitation. It is the duty of the husband, under all circumstances, to provide his wife a suitable and reasonable support, according to his degree and estate, during coverture; and if he refuses or unreasonably neglects to do so, he is liable to any one who performs that duty for him.

§ 225. If the husband and wife separate and live apart by mutual agreement, the husband is still liable for necessities supplied to his wife, under the same circumstances and subject to the same exceptions as though they cohabited as husband and wife. (*Mayhew v. Thayer*, 8 *Gray's (Mass.) R.* 172. *Lockwood v. Thomas*, 12 *Johns. R.* 248.)

This rule, however, does not apply to the case of a man having two wives, and the necessities are furnished to the second wife. In such a case, if the goods were furnished to the woman after the parties had ceased to cohabit, the plaintiff cannot recover, if it be proved that they never were married, though they had lived together as man and wife for seventeen years. Lord Ellenborough said: "Had the goods been furnished while the defendant was living with this lady, his representation that she was his wife would have been conclusive against him; but I think his liability for necessities supplied to her after they had separated, depends entirely upon whether he really had been lawfully married to her or not. If the jury think upon the evidence that she is, indeed, his wife, they will find for the plaintiff, but the action cannot otherwise be sustained." The jury found for the plaintiff. (*Munro v. De Chemant*, 4 *Camp. R.* 215. *Clancy on Hus. and Wife*, 46, 47.) He is also liable for such necessities when the separation is involuntary on the part of the wife; or when the husband turns his wife out of doors without provision and without sufficient cause, his assent

to her contract for the purchase of articles of necessity is implied by a fiction of law founded on his duty to provide for her reasonable support, by causelessly and unjustifiably sending her from his home, or giving her a general credit for necessaries for which he is answerable. (*McGahay v. Williams*, 12 *Johns. R.* 293. *Bolton v. Prentice*, 2 *Stra. R.* 1214. *Emmett v. Norton*, 34 *Eng. C. L. R.* 503.) If the husband drive his wife from his house by severity, she not being guilty of adultery, the husband continues to be liable for necessaries furnished her, the same as though he cohabited with her. (*Clement v. Mattison*, 7 *Richardson's [S. C.] R.* 93. *Shelton v. Pendleton*, 18 *Conn. R.* 417. *Evans v. Fisher*, 7 *Gilm. [Ill.] R.* 569.) Personal violence, whether actually inflicted or only threatened, is cause for the separation of a wife from her husband; and as it justifies her in quitting his roof, he continues liable for necessaries supplied to her. (*Breinig v. Meitzler*, 23 *Penn. R.* 156.) In fact, the husband continues liable for necessaries furnished to his wife in all cases where she has justifiably left him and lives separate and apart from him. (*Burlen v. Shannon*, 14 *Gray's [Mass.] R.* 433. *Kemp v. Dunham*, 5 *Harring. [Del.] R.* 417. *Raulins v. Vandyke*, 3 *Esp. R.* 251. *Hodges v. Hodges*, 1 *ib.* 441. *McCutchen v. McGahay*, 11 *Johns. R.* 281. *Hurliston v. Smith*, 11 *Eng. C. L. R.* 64. *Pomeroy v. Wells*, 8 *Paige's R.* 406. *Pearson v. Darrington*, 32 *Ala. R.* 227. *Hancock v. Merri-
rick*, 10 *Cush. [Mass.] R.* 41.) And this is the rule, notwithstanding the husband may have forbidden people to trust the wife on his account; or, in case the wife was originally compelled to leave her husband by personal abuse, he may ask her to return, and promises to use her well. (*Bradish v. Huse*, 1 *Dane's Ab. R.* 355.) The authority of the wife to bind her husband for necessaries furnished to her while living separate from him, depends upon his obligations to support his wife, independent of notice to persons who deal with her. (Therefore, if the wife is not, from her conduct, legally entitled to support from her husband, the fact that the tradesman had no knowledge of the conduct of the wife or the cause of the separation, does not give him a cause of action for the necessaries furnished.) (*Gill v. Read*, 5 *R. I. R.* 343.) By the commission of adultery, the husband justifies the wife in leaving him, and, if she leaves his house in such a case, he is liable for her necessaries, though he forbids trust to her; nor can he shield himself by offering to provide for her in a separate apart-

ment of his residence. (*Sykes v. Halstead*, 1 *Sand. R.* 483.) In one case it was held that the husband was not liable for necessities supplied to his wife, who had quitted him in consequence of his having placed a profligate woman at the head of his table. (*Horwood v. Hoffe*, 3 *Taunt. R.* 421.) But in a later case it was held that this doctrine could not be law. (*Hurliston v. Smyth*, 11 *Eng. C. L. R.* 64.)

When the husband has become liable for necessities furnished to his wife by turning her out of doors, he cannot relieve himself from such liability by cautioning the public in the newspapers, or giving notice to individuals, not to trust her on his account. It was ruled by Lord Kenyon long ago, that "if he put her out of doors, though he advertise her, and caution all persons not to trust her, or if he even gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her, for the law has said, that when a man turns his wife out of doors, he sends with her credit for her reasonable expenses." (*Harris v. Morris*, 4 *Esp. Cas.* 41.) And his Lordship said in another case, that when a wife's situation in her husband's house was rendered unsafe from his cruelty or ill treatment, he should rule it equivalent to a turning her out of the house, and that the husband should be liable for necessities furnished to her under these circumstances. (*Hodges v. Hodges*, 1 *Esp. Cas.* 441.)

§ 226. When a husband, well able to support his wife, who was insane, neglected to protect and provide for her; and she wandered into an adjoining town, where she received support, the expenses of which were reimbursed in the first instance by the town where she was relieved, and then repaid by the town of the husband's settlement and abode; it was held, in the State of Maine, that the latter town might recover against the husband the expenses thus incurred. (*Alna v. Plummer*, 4 *Greenl. R.* 258. *Vide also* *Monsen v. Williams*, 6 *Gray's [Mass.] R.* 416.) Unquestionably the husband would be liable, at common law, to pay for the support of his wife under such circumstances, to the person furnishing such support; but it is questionable whether the *public* could give the necessary relief in such a case, and then look to the husband for reimbursement, unless a statute exists providing such a remedy.

In the State of New York, it has been expressly held, that superintendents of the poor cannot maintain an action against a husband for boarding, clothing and medical aid furnished to his

wife as a pauper; notwithstanding he has maltreated her and expelled her from his house without just cause, and refuses to provide for her though of sufficient ability to do so, on the ground that the wife of a man who is bound by law to support her, and who has abundant means to do so, cannot be regarded as a pauper (*Norton v. Rhodes*, 18 *Barb. R.* 100.) This is doubtless the doctrine of the common law; although in one case in the late court of chancery of the State of New York, the chancellor made a remark which would seem to countenance the idea that an action at law would lie against the husband by the superintendents of the poor, upon common law principles. (*Pomeroy v. Wells*, 8 *Paige's R.* 406.) But the chancellor cites no authority to sustain the remark, and does not seem to have carefully considered the question, and the intimation is expressly disapproved in the case of *Norton v. Rhodes*, *supra*, while the general liability of the husband in such cases, is recognized.

§ 227. Where a husband, absent from his family, had knowledge that his wife was keeping a boarding-house, to support herself and children, and did not return to them, or make any provision for them, but suffered her to continue the business and rent a house for that purpose, without expressing any dissent, or publishing any prohibition, and she conducted it in a reasonable and prudent manner to support the family, it was held, in the State of Connecticut, that the husband was liable on her contract to pay the rent of the house. (*Rotch v. Miles*, 2 *Conn. R.* 638.) And it may be laid down as a general proposition that, at common law, a husband is liable for necessities furnished his wife, when he absents himself without leaving her with reasonable means of support, and the same will be true, if he lives separate from his family, and omits to furnish them with necessities suitable to their condition in life, and the means at his command. (*Cheek v. Bellows*, 17 *Texas R.* 613. *Kimball v. Keyes*, 11 *Wend. R.* 33. *Bird v. Jones*, 3 *Manning & Ryd. R.* 121. *Wood v. O'Kelly*, 8 *Cush. [Mass.] R.* 406. *Hall v. Weir*, 1 *Allen's [Mass.] R.* 261. It has even been held that when the husband, knowing of his wife's adultery, abandoned his house and left her in it, with children bearing his name, but without making any provision for her by reason of the separation, and the wife continued in a state of adultery, he was liable for necessities to her during that period. (*Norton v. Fazan*, 1 *Bos. & Pull. R.* 226.) This, however, must be understood with the

proviso that the tradesman was ignorant of the wife's adulterous intercourse, or the fact must exist that the husband voluntarily yielded his bed to the adulterer and made no provision for the wife. Knowing of her criminal conduct, he must either obtain a decree of divorce or continue to maintain her. Though in the State of Massachusetts it has been held, that when the husband turns away his wife for the cause of her adultery, he is not liable on her contracts made with persons having notice that he has discarded her; and it was even questioned whether the want of such notice, or that a divorce had been refused the husband on the ground of like criminality on his part, would make any difference. (*Hunter v. Boucher*, 3 *Pick. R.* 289.) This, however, comes very far short of showing that the husband is not liable under the same circumstances, provided the wife continue to inhabit his own house.

§ 228. But the husband is exempt from the duty of providing necessaries for his wife, in all cases where the circumstances are such as to preclude all possibility and even propriety, to raise an implication that the wife acts under his authority.

— Thus, if the wife leave her husband and forsakes his home of her own accord, wantonly and without a justifiable cause, the law does not continue the implied authority from him to her to purchase necessaries which obtains when they continue to cohabit. (*Collins v. Mitchell*, 5 *Harring. [Del.] R.* 369. *Pool v. Everton*, 5 *Jones' [N. C.] Law R.* 241. *Etherington v. Parrott*, 1 *Salk. R.* 118. *S. C.* 2 *Ld. Raym. R.* 1006. *Manley v. Scott*, 1 *Sid. R.* 130. 1 *Kib. R.* 430. *Bailey v. Calcott*, 4 *Jur.* 699. *Brown v. Patton*, 3 *Humph. [Tenn.] R.* 135. *Burlen v. Shannon*, 14 *Gray's [Mass.] R.* 433. *Hindley v. Westmeath*, 13 *Eng. C. L. R.* 141. *Carey v. Patton*, 2 *Ashm. [Penn.] R.* 140.)

— The cause which will justify the wife in leaving her husband so as to render him liable for her necessaries while away from him, must be grave and weighty, and if she forsake him except for some such serious cause, he is exempt from all liability on her account. (*Rice v. Durkee*, 25 *Ill. R.* 503.)

When a wife elopes from her husband without any sufficient cause, though not with an adulterer, the husband will not be liable for any of her contracts, though the person who gives her credit for necessaries had no notice of the elopement. (*McCutchen v. McGahay*, 11 *Johns. R.* 281.)

When the wife left the husband, not from any fear of personal violence, but from dislike to inmates of the family, and went to her father's, and refused to return unless the husband would get rid of such inmates, it was held that the husband was not liable to the father for her maintenance. (*Blowers v. Sturtevant*, 4 *Denio's R.* 46.) Of course, the elopement of the wife, accompanied with adultery, will discharge the husband from all obligation to find her necessaries, and consequently he will not be bound by her contracts for them under such circumstances, for it would be most unreasonable in such a case to continue the implication of his authority to her to procure necessaries; and in such an aggravated case, his refusal to take her again will not revive his obligation to maintain her. (*Morris v. Martin*, 1 *Str. R.* 647. *Manwaring v. Sands*, 2 *ib.* 707. *Hardin v. Grant*, 8 *Car. & Payne's R.* 512. 2 *Bright's Husband and Wife*, 14.) And this doctrine is carried to the extent that the husband is not liable to maintain his wife who has left him, and committed adultery, although he has himself afterward been guilty of the same offense. (*Rex v. Flintan*, 1 *Barn. & Ald. R.* 227.)

In one case the demand was for the wife's board and lodging; and it appeared that the wife had been turned out of doors by the husband, and afterward committed adultery, and finally offered to return home, but the husband refused to receive her. The court held that the husband was not liable, and said, "that, though this precise case did not appear to have been controverted before, it was probably because the points had not been doubted; and that it must be governed by the same principle on which it had been determined that the husband is not liable in cases where the wife goes away with an adulterer; that this was not a modern rule, but was mentioned by Lord Coke, that if a wife go away with an adulterer she loses her dower. That the question depended upon this, whether the necessaries were provided before or after the wife committed adultery; if after, the action could not be maintained. And that in this case, if the wife had instituted a suit in the ecclesiastical court against the husband for restitution of conjugal rights, they would not have assisted her." (*Govin v. Hancock*, 6 *Term R.* 603.)

It has been held, in general terms, that the husband is not liable for necessaries furnished to his wife living apart from him if she has committed adultery, whether before or after the separation;

and that the dismissal of the husband's petition against his wife for a divorce is not conclusive that the wife is not guilty of adultery in an action which is brought to recover for necessities. (*Gill v. Read*, 5 R. I. R. 343. *Howard v. Whitstone*, 10 Ohio R. 365, 370.)

§ 229. The husband is also exempt from the duty of supplying his wife with necessities, and is not liable for any of her debts contracted for articles furnished to her when the husband and wife part by consent, and the husband secures to the wife a separate maintenance sufficient and suitable to his condition in life, and pays it according to agreement, and the general reputation of the separation will be sufficient to defeat a recovery. (*Calkins v. Long*, 22 Barb. R. 97. *Baker v. Barney*, 8 Johns. R. 72. *Fenner v. Lewis*, 10 ib. 38. *Todd v. Stokes*, 1 Salk. R. 116.) In the case of *Todd v. Stokes*, Holt, Ch. J., says: "If baron and feme separate by consent, and she has a separate allowance, it is unreasonable she should still have it in her power to charge him."

In general where a separation of husband and wife takes place by consent, the obligation to maintain the wife lies upon the husband, unless she forfeits her right to that maintenance by her own misconduct. A provision for a separate maintenance is of comparatively modern introduction. Lord Mansfield, in a case before him, states the origin of this practice. He says, in the ancient law there was no idea of a separate maintenance; but when it was established, what said the courts? That the husband shall not be liable, even, for necessities; and they said so because convenience and justice require it. (*Corbett v. Poelnitz*, 1 Term R. 5.)

In all these cases of mutual separation, with an allowance to the wife, great stress is laid upon the circumstance of the due security and punctual payment of the pecuniary maintenance allowed to the wife. The case may be considered as, in some measure, analogous to an accord and satisfaction, when the accord avails nothing unless satisfaction be made. The covenant for an allowance is of no use if the maintenance be not paid. It gives no credit to the wife, for no action, at common law, can be brought against her. It is to supply her with ready money, for, if she have a provision, which is duly paid, she will have the means in her hands of acquiring all the necessities of life suitable to her degree. If tradesmen give her credit, it is their own fault. They can neither sue her nor the trustees; and, if the mere covenant exempt the husband, a person who has provided clothes or meat for the

wife may be compelled to seek his redress in a court of equity, and, in the mean time, the wife must starve. It is unreasonable, in the highest degree, to consider that as a ground of exemption which the law itself would impose. This is the reasoning of Chambre, J., in a case in England, in which the question was most thoroughly considered; and Heath, J., in the same case, said: "To suppose that a woman, who is parted from her husband under an agreement for a separate maintenance, is not, by law, entitled to charge her husband with payment for necessaries, when he withholds the stipulated allowance, shocks my humanity, and revolts my reason;" and, although Sir James Mansfield, Ch. J., differed with his brothers on the bench, it was held that the husband must not only covenant, through the medium of a trustee, to maintain his wife by a proper allowance, but the allowance must be punctually paid, or the person who supplies her with necessaries may maintain an *indebitatus assumpsit* against the husband for such necessaries. (*Nurse v. Craig*, 5 Bos. & Pul. R. 138.) And this is the doctrine universally recognized at the present day. There must not only be an ample and binding allowance, but the allowance must be punctually paid, in order to exempt the husband from his liability to pay for necessaries furnished to his wife, while they are living separate and apart by mutual consent. (*Vide Baker v. Barney*, 8 Johns. R. 72.) The actual payment of the allowance, or other provision, is absolutely necessary, and it has been held that a decree for alimony will not destroy the liability of the husband, unless the alimony be duly paid. (*Hunt v. DeBlaquiere*, 15 Eng. C. L. R. 535.)

§229. *a* The only essential requisites to a valid allowance are, that it be *really* sufficient for the wife, and be *actually* paid, and no notice to tradesmen, or general notoriety, is necessary to discharge the husband, whether the articles furnished were or were not necessaries. (*Mizen v. Pick*, 3 Mees. & Wels. R. 481. *Carey v. Patton*, 2 Ashm. R. 140. *Baker v. Barney*, 8 Johns. R. 72. *Mott v. Comstock*, 8 Wend. R. 544. *Wilson v. Smith*, 20 Eng. C. L. R. 486.) It has been held that if the separate maintenance be secured by *deed*, it is void unless executed by a trustee on the part of the wife. (*Ewers v. Hutton*, 3 Esp. R. 255.) But it seems that no deed is necessary to make the separation valid, so far as to exempt the husband from his liability for the debts of the wife is concerned; it is only requisite that the allowance be sufficient and

be actually paid. (*Emerj v. Neighbor*, 2 *Halst. [N. J.] R.* 142. *Hodgkinson v. Fletcher*, 4 *Camp. R.* 70.)

An agreement made in contemplation of and as an inducement to a separation of husband and wife is void, and this as between the husband and the trustee of the wife. (*Florentine v. Wilson. Lator's [N. Y.] R.* 303.)

It is proper to remark, that so far as the agreement by which husband and wife are to live separate and apart is concerned, it binds the parties and the public only so long as the parties live separate, and the articles of separation are actually performed. It is impossible for a *feme-covert* to make a valid agreement with her husband to live separate from him, in violation of the marriage contract, and of her duties to society, except under the sanction of a court of equity, and in a case where the husband's conduct entitles her to a decree of separation. The law does not authorize or sanction a voluntary agreement for a separation between husband and wife. It merely tolerates such agreements when made in such a manner that they can be enforced by or against a third person acting in behalf of the wife. (*Rogers v. Rogers*, 4 *Paige's R.* 516.) But it has been held in the State of Ohio, that articles of separation by husband and wife, through the medium of a trustee, for the separate support and maintenance of the wife, and when separation takes place, are not void as against public policy. (*Bettle v. Wilson*, 14 *Ohio R.* 257.)

The return of the wife to the bed and board of her husband terminates an agreement between them to live separate forever, and destroys the legal effect of a bond given by him as a part of that agreement for her separate maintenance; and her subsequent abandonment of him cannot revive the bond, or restore his legal liability upon the agreement. (*Shelthar v. Gregory*, 2 *Wend. R.* 422.)

If husband and wife agree to separate temporarily, and the husband secure her an annual allowance, an offer by him to take her back and support her ends the arrangement, and a court of equity will not compel further payment of the allowance; but if the agreement be to live apart so long as both shall live, the rule is otherwise. (*Calkins v. Long*, 22 *Barb. R.* 97.)

Of course, after an agreement of separation between husband and wife is at an end, and the wife has kept herself pure, and returns or offers to return to her husband, he will thereafter be

liable for her support. The subject of articles of separation between husband and wife in another aspect will be recurred to hereafter. If the husband and wife separate by mutual consent, and the husband make a contract with a third person to maintain the wife, and she voluntarily leaves such third person and without any just cause, she carries no authority to pledge the credit of her husband for her support. (*Pidgin v. Cram*, 8 N. H. R. 350.) And any individual furnishing necessities to the wife, while supplied by such third person, cannot recover for them; especially if the husband had given public notice not to trust his wife. (*Kimball v. Keys*, 11 Wend. R. 33.) Although the husband is not generally liable for necessities for his wife, when she is living apart from him with an adequate allowance, yet for articles of the peace against him, rendered necessary by his own violent conduct, he has been compelled to pay. (*Turner v. Rookes*, 37 Eng. C. L. R. 35.) He is not liable, however, for money lent the wife, to prosecute him for an assault upon her. (*Grindell v. Godmond*, 31 Eng. C. L. R. 431.) Nor for the counterpart of the deed of separation. (*Ladd v. Lynn*, 2 Mees. & Wels. R. 265.) Neither is he liable to his wife's attorney who prosecutes her suit against him for a divorce on the ground of adultery. (*Morrison v. Holt*, 42 N. H. R. 478.)

§ 230. If the husband take back his wife after a separation, whether voluntary or justifiable, he is afterward liable for necessities furnished to her. Even though she elope with an adulterer, if she return to him and he take her back, he will be liable for necessities supplied to her, notwithstanding her former adultery. In one case Lord Kenyon said that, "though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the time of her elopement, that is no answer now. The husband has taken her back, and she was from that time entitled to dower. She was *sponte retracta*, and of course entitled to maintenance during coverture, if her husband turned her out of doors." (*Harris v. Morris*, 4 Esp. N. P. Cas. 41.)

So it has been held by the American courts that when a wife elopes from her husband without sufficient cause, and he is reconciled to her afterward, his assent to her contracts for necessities thenceforward may be inferred by the jury. (*Henderson v. Stringer*, 2 Dana's [Ky.] R. 291.) It has even been held, and such is the law, that when the wife leaves her husband without justifiable cause, if she keeps herself pure, she may return to her

husband, and if he refuses to receive her, his liability upon her contract for necessities is revived from that time, notwithstanding a general notice not to trust her. (*McCutchen v. McGahay*, 11 *Johns. R.* 281.) And if application be made to a husband by a third person, on behalf of the wife, to receive her, and he, without questioning the authority of the person applying, puts his refusal on other grounds, it will be equivalent to a personal application by the wife herself. (*McGahay v. Williams*, 12 *Johns. R.* 293.) The same doctrine, that the husband is liable for the necessities furnished to his wife, if he refuse to receive her on her return after leaving him, providing she has remained chaste, has been also recognized by the courts of South Carolina. (*Clement v. Mattison*, 7 *Rich. R.*, 93.)

The receiving of the wife back into his house by the husband, after she has left him and lived away from him, is regarded as a condonation or forgiveness of the offense by him; and in such a case it has been held that he becomes liable for her debts *during her absence*. (*Hall v. Hall*, 4 *N. H. R.* 462. *Quincy v. Quincy*, 10 *ib.* 272. *Robison v. Gosnold*, 6 *Mod. R.* 171, case 247.)

§ 231. It has been stated by the text writers, and justified by ancient English authority, that while husband and wife live apart, the husband's assent to her contracts for necessities will be presumed unless the contrary appears. (*Clancy on Husband and Wife*, 28.) And it has been held in two or three cases in the American courts, that the husband's assent to the contract of his wife for *necessaries* will be presumed where they live apart, and that in such a case the burden of proof is upon the husband to show that the separation was not through his fault, and that *prima facie* he is liable for the wife's necessities when separated. (*Frost v. Willis*, 13 *Vt. R.* 202. *Rumney v. Keyes*, 7 *N. H. R.* 571.) This, however, is not the doctrine now held by the courts. The husband's assent is presumed so long as he cohabits with his wife, but while they live apart, the presumption is, that the husband is not liable, and the circumstances fixing his liability must be shown by the person seeking to charge him. (*Rea v. Durkee*, 25 *Ill. R.* 503.)

The authorities of the present day abundantly show that one who gives credit for necessities furnished to the wife while separate from her husband, takes the risk of establishing a case against the husband, and that the burden is on him to prove his case (*Cartwright v. Bates*, 1 *Allen's [Mass.] R.* 514); or, that where the

demand arose after the wife had left her husband, the burden is upon the plaintiff of showing that the separation had been brought about by the improper conduct of the husband. (*Blowers v. Sturtevant*, 4 *Denio's R.* 46, 49.) A wife living separate from her husband has no *implied* authority to obtain credit for her husband. (*Gill v. Read*, 5 *R. I. R.* 343.) Those who trust a wife who has separated from her husband, do it at their peril. They must look to the grounds of the separation. (*Billing v. Pitcher*, 7 *B. Mon. R.* 458. *Reese v. Chilton*, 26 *Miss. R.* 598.)

To support an action of *assumpsit*, for goods sold and delivered to the wife while living apart from her husband, it is necessary to show affirmatively, first, the delivery of the goods; second, that the articles sold were necessities; and, third, that the wife had separated from the husband for a good and justifiable cause. (*Breinig v. Meitzler*, 23 *Penn. R.* 156.) If the parties cohabited at the time of the sale, it would only be necessary, in the first instance, to prove the delivery of the goods, and that they were necessities, and then the assent of the husband would be implied from the fact of coverture, and he would be presumed to be liable. But when there is a separation, and the parties live apart, the presumption is against the authority of the wife to make the purchase upon the credit of the husband, rather than in favor of it. In all cases where goods are supplied to a married woman, *not living with her husband*, the burden is on the plaintiff to show that the circumstances of the separation were such as to make the husband liable in law, or that the wife had actual authority; for in the absence of cohabitation, the presumption of law is *against his liability* even for the wife's necessities. (*Mainwaring v. Leslie*, 12 *Eng. C. L. R.* 238. *Clifford v. Laton*, 14 *ib.* 188. *Edwards v. Towels*, 44 *ib.* 624. *Bird v. Jones*, 3 *Man. & Ry. R.* 121. *Ozard v. Damford*, *Schw. N. P.* 299. *Walker v. Simpson*, 7 *Watts & Serg. [Penn.] R.* 83. *Carey v. Patton*, 2 *Ashm. [Penn.] R.* 140. *Burge v. Jones*, 7 *Law J. K. B.* 59.)

§ 232. As the law requires the husband to provide necessities for his wife, except he have a legal excuse for omitting that duty, it becomes important to ascertain what articles are embraced within the meaning of that term. In a general sense, the term *necessaries* means all such things as are proper and requisite for the sustenance of man, and, to be more specific, embraces clothes, meat, medicine and habitation, and, sometimes, legal advice,

although, to bind the husband, these provisions must be consistent, not only with his rank, but, also, with his estate. Besides board and lodging, necessities are such articles as comport with the wife's situation in life and her husband's fortune, and are usually worn or possessed by persons in similar conditions of life. (*Ozard v. Dumford*, *Selw. N. P.* 260. *Dennys v. Sargeant*, 25 *Eng. C. L. R.* 504. 2 *Bright's Husband and Wife*, 7.) Among the articles held to be necessities are board and lodging, medicines and medical attendance, and reasonable expenses during illness. (*Harris v. Lee*, 1 *P. Wms. R.* 438.) And, in England, it has been held that costs of the proctor employed by the wife to defend a suit for a divorce, are embraced in the term. (*Ex parte Moore*, 1 *De Gea's R.* 173. 14 *Law Jour. [N. S.]* 19.) But, in this country, it has been held that the husband is not liable to the wife's attorney who was employed to prosecute her suit against him for a divorce. (*Coffin v. Dunham*, 8 *Cush. [Mass.] R.* 404.) Or, if the wife, who is plaintiff in an action for a divorce, discontinues the suit, or is defeated in it, and judgment is rendered against her, her husband is not liable to her attorney for costs incurred by her in the action. (*Phillips v. Simmons*, 11 *Abbott's Pr. R.* 287, and cases there cited.)

When the wife is living apart from her husband, the proper mode of determining what articles the wife may supply herself with, at the expense of the husband, is to ascertain what a prudent woman would expect, and a good husband would be willing to furnish, if the parties were living harmoniously together, which question would be most fairly dealt with by calling witnesses who know the circumstances, style of living, and social position of the husband and his family. And, as the solution of this question, in all cases, depends, *inter alia*, upon the amount of the husband's estate, any testimony which tends to give light upon the subject of the husband's property, real or personal, will be received. (*Breinig v. Meitzler*, 23 *Penn. R.* 156.)

A physician's bill for necessary medical attendance upon a wife, who has justly left her husband's house, may be recovered of the husband by the person who, at the request of the wife, employed and paid the physician. There is no doubt but such medical attendance is embraced within the class denominated necessities, and could be recovered of the husband by the physician who rendered the service; and it has been held that the person who, at the

request of the wife, employed and paid the physician, may recover the amount paid. (*Mayhew v. Thayer*, 8 Gray's [Massachusetts] R. 172.) *was then furnished at his request*

§232. *a* A claim for necessities furnished to a married woman during the time while she was prosecuting a libel for divorce, is not discharged by a decree of court granting the divorce and allowing alimony to her for her past and future expenses, although the person who furnished the necessities was her father, and the libel for divorce was prosecuted under his direction. (*Dowe v. Smith*, 11 Allen's [Mass.] R. 107. And vide also *Keegan v. Smith*, 11 Eng. C. L. R. 253.) This would seem to be a sensible rule, for the reason that the husband is manifestly liable for the necessities of his wife under such circumstances, and the fact that alimony is allowed for past expenses does not remedy the matter, because the person who furnished the necessities has no claim on the wife, and the presumption is that the court took that claim into the account in fixing the alimony.

What are to be considered necessities in each particular case, is a question to be decided by the jury under the proper instructions by the court. (*Lane v. Ironmonger*, 13 Mees. & Wels. R. 368. *Rea v. Durkes*, 25 Ill. R. 503.) What are necessities for the wife, is a question that is susceptible of no sharp definition, and is generally a question for the jury under all the circumstances of the case; but the court may, in many cases, pronounce authoritatively on the question and withhold it from the jury. (*Mahony v. Evans*, 51 Penn. R. 80.) It has been held that articles of jewelry are not necessities for the wife of a special pleader. (*Montague v. Benedick*, 3 Barn. & Cress. R. 631.) But in one case, where a tradesman furnished the wife of a sergeant, afterward a judge, with lace and silver fringes for a petticoat and side-saddle, which amounted to ninety-four pounds sterling, and all within four months, they were held necessities, and a verdict was found for the plaintiff. (*Morton v. Within*, Skin. R. 349.)

It may be remarked, though it would hardly seem necessary, that the husband is not liable for necessities furnished to his wife during coverture, or while living apart, if the tradesman has agreed not to charge him. (*Dixon v. Hurrell*, 34 Eng. C. L. R. 599.) Neither is he liable when the dealing took place on the credit of another. (*Harvey v. Norton*, 4 Jur. 42.) Nor when the tradesman made out the invoices and accounts to the wife, and drew bills

of exchange for her to accept. (*Freestone v. Butcher*, 38 *Eng. C. L. R.* 375.)

§ 233. A husband is sometimes held responsible for the torts and *quasi*-criminal acts of the wife during coverture; and in some instances the wife is exempt from the consequences of her criminal acts. Thus, in the State of Georgia, when a *feme-covert* commits a crime under threat, command or coercion of her husband, she is not punishable for the offense, but the husband is punished in her stead. (*Cobb's Laws*, 1851, *p.* 779, § 1.)

So, a husband is answerable for a forfeiture under a penal statute incurred by his wife. Thus, when the wife, in the absence of her husband, and without his consent, sold liquors by retail, without a license, the husband was held answerable in a *qui tam* suit for the penalty given by the statutes of New York. (*Hasbrouck v. Weaver*, 10 *Johns. R.* 247.) In the State of South Carolina, it has been held that, if the wife commit a tort in the presence of her husband, the law regards it as his act, and in a civil action he alone is liable. (*Park v. Hopkins*, 2 *Bailey's R.* 411.)

The rule that the husband is liable for the torts of the wife, committed during coverture, is understood to be as well settled in this country as in England. (*Wagner v. Bills*, 19 *Barb. R.* 321.) And the rule applies to torts committed both before and during coverture. (*Hawkes v. Hamar*, 5 *Binn. [Pa.] R.* 43. *Know v. Pickett*, 4 *Dessau. R.* 92. *Palmer v. Wakefield*, 3 *Beav. R.* 23. *Cox v. Hoffman*, 4 *Dev. & Batt. R.* 180.) If the tort was committed by the wife *dum sola*, it must appear that she is the wife *de jure*, or the husband will not be liable. (*Durhelt v. Ellswell*, 1 *Ashm. R.* 200.) The husband and wife should be joined as co-defendants in an action for the tort of the wife, although it was the sole act of the wife. (*Matthews v. Friestil*, 2 *E. D. Smith's R.* 90.)

The common law rule is that, if a *feme-covert* commit theft, burglary or other civil offenses against the laws of society, by the coercion of her husband, or even in his company, which the law construes a coercion, she is not guilty of any crime, upon the theory that she is acting by compulsion, and not of her own free will. The presumption of coercion, however, does not arise unless the husband is present when the offense is committed. If the wife commit an offense alone without the husband's concurrence, she may be punished by way of indictment, without him. The law

seems to protect the wife in all felonies committed by her in company with her husband, except murder and manslaughter. The reason why she is excused in cases of burglary, larceny and the like is, because it is supposed she cannot tell what property the husband may claim in the goods. (4 *Black. Com.* 28, 29, notes 10, 11, 12.) This, however, can only be considered the *presumption* of law by reason of the presence of the husband when the offense was committed. The more correct rule is, that if a felony be shown to have been committed by the wife in the presence of the husband, the *prima facie* presumption is, that it was done by his coercion; but such presumption may be rebutted by proof that the wife was the more active party, or by showing an incapacity to coerce. (1 *Russell on Crimes*, 22.) And whenever it appears that the offense of the wife was committed under the coercion of the husband, express or implied, the husband is responsible for the offense. There is no legal presumption that acts done by a wife in her husband's absence are done under his coercion or control. Indeed, if she commit a crime in the absence of her husband, even by his order or procurement, her coverture will be no defense. (*Commonwealth v. Butler*, 1 *Allen's [Mass.] R.* 4.) And in all cases, the presumption which the law raises when the acts complained of are done by the wife in the presence of the husband, like other presumptions it may be repelled. (*Wagner v. Bill*, 17 *Barb. R.* 321, 325. *Commonwealth v. Lewis*, 1 *Metc. [Mass.] R.* 151; 153.) It is not necessary to allege in the indictment against a *feme-covert*, that the offense was not committed by the coercion of her husband. (*State v. Nelson*, 29 *Maine R.* 329.) In the State of Ohio, it has been held that if the wife join with the husband in committing a crime less than murder, she is presumed to act under the coercion of her husband, and in law is not guilty. (*Davis v. The State*, 15 *Ohio R.* 72.) This doctrine needs to be qualified. The presumption in such a case is, that the wife is under the coercion of her husband; but if the circumstances show that she acted voluntarily and with a felonious intent, she is equally guilty with her husband, and should be convicted.

It has been held in the State of Massachusetts, that the wife cannot be indicted jointly with her husband, for a larceny. (*Commonwealth v. Trimmer*, 1 *Mass. R.* 476. *Martin v. Commonwealth*, *Ib.* 390.) And the same doctrine has been held in the State of Pennsylvania. (*Pennsylvania v. Lovell*, *Addison's R.* 18.) But

this is undoubtedly erroneous. There is no doubt that a wife may be jointly indicted with her husband. The later authorities on the point are too numerous to be withstood. Whether she can be convicted separately, or jointly with him, is a question to be determined by direct evidence, or legal presumption, concerning the freedom of her action, or the coercion of her husband. (*Vide Commonwealth v. Murphy*, 2 *Gray's [Mass.] R.* 510. *Wagner v. Bill*, 19 *Barb. R.* 321. *State v. Parkerson*, 1 *Strobhart's [S. C.] R.* 169.)

The husband is liable for the penalty denounced against a toll-gatherer by statute, for exacting and receiving more than the legal tolls, though it be exacted and received at the gate by his wife. So held, when it appeared that the toll was demanded and received by the wife in the absence of her husband. (*Marselis v. Seaman*, 21 *Barb. R.* 319.) This is upon the principle that the wife, in the absence of her husband, is presumed to be his agent, and when she demanded and received the toll, she was acting within the scope of the employment, and her acts bound her husband.

Thus much upon the subject of the liabilities incurred by the husband on account of the marriage; the reason assigned for which liabilities, at common law, is, that he is entitled to the rents and profits of the wife's real estate during coverture, and to the absolute dominion over her personal property in possession, which will be fully treated of hereafter.

CHAPTER XX.

THE INTEREST OF THE HUSBAND IN THE WIFE'S PERSONAL PROPERTY AT COMMON LAW—HIS INTEREST IN HER PERSONAL PROPERTY IN POSSESSION—HIS INTEREST IN PERSONAL ESTATE BELONGING TO HER AS EXECUTRIX OR ADMINISTRATRIX—HIS INTEREST IN HER PERSONAL PROPERTY UNRECOVERED AT THE TIME OF HER DEATH—HIS INTEREST IN HER CHATTELS REAL.

§ 234. At common law, marriage is an absolute gift to the husband of the goods, chattels and personal estate of which the wife was actually or beneficially possessed at the time of the marriage, and of all such as shall come to her during coverture. This is the doctrine clearly laid down by the text writers, and universally sanctioned by judicial authority. (1 *Bright on Husband and Wife*,

34. *Bing. on Cov.* 208. *Legg v. Legg*, 8 *Mass. R.* 99. *Howes v. Bigelow*, 13 *ib.* 384. *Winslow v. Crocker*, 17 *Maine R.* 29. *Hyde v. Stone*, 9 *Cow. [N. Y.] R.* 230. *Blanchard v. Blood*, 2 *Barb. R.* 352. *Morgan v. Thames Bank*, 14 *Conn. R.* 99. *Matter of Grant*, 2 *Story's R.* 312. *Hoskins v. Miller*, 2 *Dev. [N. C.] R.* 360. *Hawkins v. Craig*, 6 *Mon. [Ky.] R.* 257.) The husband, therefore, becomes absolutely vested with all such personal property of his wife as comes to her actual possession during coverture, so that he may make any disposition of it in his life-time without her consent, or devise it by will, and such disposition of it will be effectual, whether he survives her or not; and should he neglect to dispose of it by will or otherwise in his life-time, it will go to his executors or administrators, and not to the wife, though she survive him. And so rigid is this rule at common law, that though the husband live separate from his wife, and in continued adultery, his right to her personal property is still the same, so long as the relation of husband and wife continues. (*Co. Litt.* 351 *b.* *Russell v. Brooks*, 7 *Pick. R.* 65. *Turtle v. Muncy*, 2 *J. J. Marsh. [Ky.] R.* 82.)

If chattels are bequeathed to a wife generally, without any restriction, and are reduced to possession by the husband, with her consent, they become his absolute property in equity as well as law. (*Shirley v. Shirley*, 9 *Paige's R.* 363.)

But if personal property be not in the possession of the wife at the time of the marriage, the husband must reduce it to his possession during coverture, in order to acquire an absolute title to it and pass it to his representatives. (*Early v. Sherwood*, 1 *Dudley's [Geo.] R.* 7. *Mayfield v. Clifton*, 3 *Stewart's [Ala.] R.* 375. *Hynes v. Lewis*, 1 *Taylor's [N. C.] R.* 44. *Whithin v. Frazier*, 1 *Haywood's [N. C.] R.* 375. *Byrne v. Stewart*, 3 *Dessau. [S. C.] R.* 135. *Wilkinson v. Perrin*, 7 *Mon. R.* 216, 246.) It has been held, however, that a vested remainder in chattels, dependent on a life estate, vests in the husband absolutely, and without any reduction to possession. (*Dade v. Alexander*, 1 *Wash. [Va.] R.* 30. *Lowry v. Houston*, 3 *How. [Miss.] R.* 394. *Pinckard v. Smith*, 6 *Litt. [Ky.] R.* 331. *Pattin v. Hall*, 2 *B. Mon. R.* 462.)

Where the wife has a legal estate in personal chattels, and the right of immediate possession in severalty, the rights of the husband will vest the property in him. (*Savery v. Gardner*, 1 *Hill's [S. C.] R.* 191.)

A share of personal estate, accruing in the right of the wife during coverture, vests, even before distribution is made, in the husband absolutely, and does not in the event of his prior death survive to the wife. (*Griswold v. Penniman*, 2 Conn. R. 564.)

Money in the hands of a wife at the decease of her husband, earned and received by her before the marriage, or given to her by her husband afterward, is the property of the husband, and passes to his administrator. (*Washburne v. Hale*, 10 Pick. R. 429.)

So far as regards creditors of either husband or wife, all the money and other personal property of the family are presumed to be the husband's, and all the earnings of the family, with some exceptions, are conclusively so presumed. (*Walker v. Reamy*, 36 Penn. R. 410.)

Notwithstanding the statutes of Pennsylvania securing to married women rights not guaranteed to them by the common law, in 1853 it was declared that the husband was entitled to the person and labor of his wife, and all the benefits of her industry and economy. (*Raybold v. Raybold*, 20 Penn. R. 308.)

With respect to the rule that requires the husband to reduce his wife's personal property to possession in order to hold it as his own, it has been held that where a wife before marriage owned bank stock, and her husband, after marriage, received the dividends until the bank charter expired, at which time the stockholders were entitled to take half the amount of their shares in shares of a new bank, and the balance in money, and he subscribed the authorized amount in the name of his wife, and refused to receive the balance in money, saying it was not his, but his wife's, and such balance was then passed to his credit, under the circumstances he did not reduce the shares to his possession, and it was therefore further held that after his decease his wife could recover of his executor the said balance of money and the dividends received by him, and a sum paid to him on account of the reduction of the capital stock, with interest thereon. (*Stanwood v. Stanwood*, 17 Mass. R. 57.) And it has been held in the surrogate's court of the city and county of New York, that the husband's taking the dividends of stock standing in the wife's name only, reduces the dividends, and not the stock, into his possession. (*Burr v. Sherwood*, 3 Brad. R. 85.)

Money earned by the wife while the parties live apart belong absolutely to the husband, at common law, irrespective of the cir-

cumstances of their separation, so long as the marriage relation continues between them. (*Glover v. Proprietors of Drury Lane*, 18 *Eng. C. L. R.* 269. *Prescott v. Brown*, 23 *Maine R.* 305.)

By the marriage the husband becomes the owner, not only of his wife's personal property, but if they unite in selling her realty and receive the money for it, this is his also; and if it is invested in real estate, and the title taken to the husband, the estate is his. (*Ramsdall v. Craighill*, 9 *Ohio R.* 197.) It has, however, been held in the State of Pennsylvania that where a wife allows a mortgage for the purchase-money on the sale of her land, to be given to herself and husband jointly, it is not sufficient evidence of a gift by her to her husband to sustain his title to the same. (*Trimble v. Ries*, 37 *Penn. R.* 448.) But in the State of Michigan, it has been held that the wife's property can be acquired by the husband only by gift or purchase, of which use or simple possession is not sufficient evidence. This, however, is in some respects different from the rule at common law. (*White v. Zane*, 10 *Mich. R.* 333.)

It has been held by the English chancery, on the principle that marriage is a gift of the personal property of the wife to the husband, that there is no difference between property to which the wife is entitled in equity and property to which she is entitled at law. (*Osborn v. Morgan*, 41 *Eng. Ch. R.* 432.)

§ 235. The marriage at common law, also vests in the husband the personal chattels of his wife in the hands of a third person at the time of the marriage; and he may therefore bring detinue or replevin for them without joining his wife in the action. (*Powers v. Marshall*, 1 *Sid. R.* 172. *Bowen v. Mattaire*, 1 *Selw. N. P.* 11th ed. 314.) Of course, if the chattels be converted subsequent to the marriage, the husband may bring trover for them; because this supposes the property in the wife, which by the marriage is transferred to the husband, and therefore the conversion is a tort to him alone. (*Powers v. Marshall*, *supra*. *Blackborne v. Graves*, 2 *Lev. R.* 107.) And though the husband and wife may in this case join in the action as plaintiffs, yet they cannot allege the conversion to be to the damage of both, for the reason that the property is in the husband alone. (*Nelthorp v. Anderson*, 1 *Salk. R.* 114.)

In all cases where the wife's chattels come to the possession of the husband an action in relation to them may be brought by the

husband alone, upon the general principle, "that that which the husband may discharge alone and of which he may make disposition to his own use, for the recovery of which he may sue without his wife." (*Brett v. Cumberland*, 3 *Bulstrode's R.* 164, recognized in *McNeill v. Holloway*, 1 *Barnwall & Alderson's R.* 224.)

§ 236. As has been observed, marriage is an unqualified gift to the husband of all the goods and personal chattels absolutely possessed by the wife at the time of the marriage, or which came to her possession in her own right during coverture. But marriage makes no such gift to the husband of the goods and chattels held by the wife *in autre droit*, "in rights of another," as executrix, administratrix or trustee, because such a gift would do injustice to the creditors and next of kin of the testator or intestate; besides, the wife in such a case takes no beneficial interest in the property, and therefore has none which the law can transfer to the husband. (1 *Bright's Husband and Wife*, 39.) But as the husband will be liable if his wife should misapply the funds which may be in her hands as such executrix or administratrix, for his own safety he is entitled to administer in such a case in his wife's right; and as an incident to this right he may dispose of the personal property and effects vested in his wife as executrix or administratrix, for the benefit of the estate of the testator or intestate. He may also release debts owing to the estate of the testator or intestate, to whom the wife is executrix or administratrix. (1 *Bright's Husband and Wife*, 40.)

After marriage the wife will not be permitted to administer without the husband's consent, nor will payments made to her as executrix or administratrix without his consent be valid. This rule is for the protection of the husband, for the reason that he is liable for the acts of his wife with respect to the trust. (*Anonynous*, 1 *Salk. R.* 282.) In a late case, however, administration was granted to the wife without her husband joining, she living separate from him, and all right to the estate of the deceased having been conveyed to her under a deed of separation, and no particular objection is discovered to the practice in the particular case. (*In re Hardinge*, 2 *Curt. R.* 640.) The common law rule upon this subject of administration is sometimes modified by statute, and in that case the liability of the husband and the powers of the wife depend upon the provisions of the statute.

§ 237. By the rule of the common law, if the husband survive the wife he is entitled to all her personal estate which continued in action or unrecovered at the time of her decease, and he may demand, recover and enjoy the same. This rule has its origin, not in the fact that "the husband is the next and most lawful friend" of his wife, but in the fact that *jure mariti* he is permitted to administer upon her estate. (*McCosker v. Golden*, 1 *Brad. Sur. R.* 64. *Ransom v. Nichols*, 22 *N. Y. R.* 110.) But, whatever the origin of the rule, the doctrine of the common law is clear that where the wife dies, leaving her husband surviving, the surplus of her personal estate belongs, after the payment of her debts, to her husband, and not to her next of kin. (2 *Black. Com.* 515. *Donnington v. Mitchell*, 1 *Green's [N. J.] Ch. R.* 243. *Lush v. Alburtis*, 1 *Brad. R.* 456. *Shumway v. Cooper*, 16 *Barb. R.* 556.) And, if he does not take out letters of administration, he is equally entitled to it. (*Clough v. Bond*, 6 *Jur.* 50.) Or, should he die before the same is recovered, it will go to his next of kin. Formerly, however, in this latter contingency, the practice was to grant letters of administration *de bonis non administrandis* of her estate, to the representatives of the wife, although the administrators were held to be trustees of what they received for the next of kin of the husband. (*Humphrey v. Bullen*, 1 *Atk. R.* 458. *Elliott v. Collier*, 3 *ib.* 526.) But this practice was found to be inconvenient, as it was the only case where the rule was not followed of uniting the administrative to the beneficial interest, and the practice now is to grant such letters to the representatives of the husband, even when he dies without taking out administration to the wife, unless the wife leaves nothing to which the husband can be entitled as her representative. (*Fielder v. Hanger*, 3 *Hagg. Ecc. R.* 770. *In re Mary Pountney*, 4 *ib.* 289.)

If the husband dies, leaving assets of his wife unadministered, they pass to his executors or administrators, as a part of his personal estate, and they need not take out letters of administration on her estate. This is the rule, at common law, and it is expressly incorporated into the statutes of most of the States. (*Roosevelt v. Ellithorp*, 10 *Paige's R.* 415. *Lockwood v. Stockholm*, 11 *ib.* 87.)

If administration *de bonis non* of the wife be granted to a third person, he is a trustee for the representatives of the husband in case of his death after the wife. (*Squib v. Wyn*, 1 *P. Wms. R.* 378. *Cart v. Rees*, *ib.* 381. *Whitaker v. Whitaker*, 6 *Johns. R.* 112.

Hendin v. Colgin, 4 *Munf. R.* 231. *Clark v. Clark*, 6 *Watts & Serg. R.* 85.)

If the husband, after the decease of his wife, without taking out letters of administration, obtain possession of the wife's personal property, he may retain it against his wife's next of kin. (*Hendin v. Colgin*, *supra*.) And if the wife's next of kin administer, he will be a trustee for the husband or his representative, if the husband die before administering, as has been before intimated. (*Stewart v. Stewart*, 7 *Johns. Ch. R.* 229. *Betts v. Kimpton*, 2 *Barn. & Adol. R.* 273. *Hunter v. Hallett*, 1 *Eden's Ch. R.* 388.)

When the husband has permitted his wife, without any marriage contract, to retain possession and control of the personal property she had before marriage, he is nevertheless entitled to administration upon her estate, and to retain the balance to his own use. (*Jones v. Brown*, 37 *N. H. R.* 439.) This follows as a matter of course, from the right which he has at common law, and generally by statute, to take and hold the goods and chattels in the wife's possession during the joint lives of himself and wife, and after her death if he survives her, as his administrator or otherwise, to take and hold, reduce into his possession, and recover absolutely for his own use and benefit, subject to the payment of her debts, all of her chattels and personal estate, which he does not reduce into his possession in her life-time, or which may not become his absolutely, prior to his death, by being by her reduced into her possession; which is a vested right in the husband by the marriage in the life-time of the wife. (*Vide Vallance v. Bausch*, 28 *Barb. R.* 633. *Lee v. Wheeler*, 4 *Georgia R.* 541. *Westervelt v. Gregg*, 12 *N. Y. R.* 206.)

A devise of real and personal property to a married woman for her sole and separate use, "not to be liable for her husband's debts, nor subject to curtesy or any life estate or marital rights," does not exclude the husband from administration under the intestate laws of Pennsylvania, and the same would probably be the rule at common law. (*Farie's Appeal*, 23 *Penn. R.* 29. *S. C.* 2 *Am. Law Reg.* 510.)

The representative of a second wife is not entitled to represent the first wife, without citing the husband's next of kin, or their renouncing. (*In re Sowerby*, 2 *Curteis' R.* 853.)

§ 238. The husband, upon marriage, becomes possessed of the chattels real of which the wife is or may be possessed during the

marriage, although the law gives to him a qualified title only in these; that is an interest in his wife's right, with a power of alienation during coverture. Chattels real are such as are annexed to or savor of the realty, as terms for years of land, leases and mortgages, and the effect of marriage, at common law, is to vest in the husband all these interests of the wife during coverture. If the wife is seised of an estate of inheritance, her husband gains a title to the rents and profits during their joint lives. (*Jones v. Patterson*, 11 Barb. R. 572. *Clapp v. Stoughton*, 10 Pick. R. 463.) The husband has the power, by the rule of the common law, to sell, assign, mortgage, or otherwise dispose of these interests as he pleases, by an act in his life-time, without the consent or concurrence of his wife, except it be such an interest as the wife has by the provision or consent of her husband, by way of settlement. (2 *Kent's Com.* 134. *Turner's case*, 1 Vern. R. 7. *Whitmarsh v. Robinson*, 1 Coll. R. 571.)

It is said that an assignment of the real chattels of the wife by the husband will bind her, though it be made without consideration; and if the wife has a judgment, and it is extended on an *elegit*, the husband may assign it without consideration; and if a judgment is given in trust for a *feme-sole* who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest. (*Cateret v. Paschall*, 3 P. Wms. R. 200.)

If a *feme-sole* has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under the decree, and marries, the husband may assign this interest without consideration, without regard to his wife. (*Merriweather v. Brooker*, 5 Litt. [Ky.] R. 256.) He may sell the usufructuary estate in his wife's land without her concurrence. (*Bailey v. Duncan*, 4 Mon. [Ky.] R. 260.) And as the same rule of property prevails in equity as at law in these cases, if the wife is entitled to a term for years held in trust for her benefit, the assignment or alienation of it by her husband will bind her surviving him. (*Turner's case*, *supra*. *Tuder v. Samyne*, 2 Vern. R. 270.) And it has been held that the assignment of the wife's equitable chattels real by the husband defeats her right by survivorship, though made without consideration. (*Cateret v. Paschall*, 3 P. Wms. R. 200.) However, the law now seems to be settled, that the assignment must be for a valuable consideration, otherwise the right of the

wife will not be disturbed. (*Cox's note to Squib v. Wyn*, 1 P. Wms. R. 380.)

If it be an equitable interest, and the husband should find it necessary to have recourse to a court of equity to assert his right to the term, as when it has been vested in trustees for the benefit of the wife, still he may dispose of it as he will, unless the trust has been created with his privity and consent. (*Pitt v. Hunt*, 1 Vern. R. 18.)

§ 239. Chattels real, whether they are legal or equitable interests, are not choses in action, because they do not stand in need of being reduced to possession, being in possession already, and lying in action; yet, if the husband do not transfer them in his life-time, which he may by grant or demise, he cannot dispose of them by will, and they will survive to the wife. (*Mitford v. Mitford* 9 Ves. R. 98. *Clancy's Hus. and Wife*, 9.) And if the husband grant part of a term which he has in right of his wife, this will not destroy her right of survivorship altogether, for if the husband die in such a case, the wife will have the remainder. (*Sym's Case*, Cro. Eliz. 33.)

If the husband does not alien the chattels real of his wife, and he survives her, the law gives them to him, not as representing his wife, but in his marital right; no administration, therefore, is necessary to be taken out by him to her. Thus, a man possessed of lands for a term of nine hundred and ninety-nine years, granted the term to a lady, and her heirs immediately after the death of the grantor, to hold the same to the lady grantee, and her heirs to and for her and their own proper use forever, and afterward married the grantee, and the marriage took effect. The husband survived the wife, and died without issue, intestate, and without having taken out administration to his wife, administration was taken out to him, and his administrator claimed the term. In the mean time administration had been taken out to the deceased wife, and her administrator also claimed the term. The court construed the grant as a present gift to the wife in case she survived her husband, to take effect in possession on that event, and held that the term upon the death of the grantor went to his administrator, and not to the administrator of the wife. In the course of the consideration of the case, the doctrine was clearly brought out, that if the husband do not alien the chattels real of his wife, and he survives her, the law gives them to him. (*Doe v. Polgrean*,

1 *H. Blackstone's R.* 535. *Vide also 1 Bright's Husband and Wife*, 95.)

§ 240. If the wife has the right only to a term, the right will not survive to the husband, but will belong to the wife's representatives; and if the wife be the survivor, and the term remains in *statu quo*, she, and not her husband's next of kin, will be entitled to them. So if there be two single women joint tenants of a lease for years, and one of them marries and dies, the term will survive to the other joint tenant; for although the chattels real are given to the husband if he outlives his wife, yet the survivorship between the joint tenants was the elder title, which was not severed by the husband during coverture, marriage itself not having that effect. This, of necessity, is an exception to the general rule. (1 *Bright's Hus. and Wife*, 95, and *authorities there cited*.) When, during coverture, a lease for years is granted to the wife, adverse possession, which commences during coverture, may be treated as adverse to the wife or to the husband. (*Doe v. Wilkins*, 5 *Nev. & Man. R.* 435.) The wife's remainder in leasehold property, vested in interest, though not vested in possession, becomes her husband's on marriage. (*Matter of Lufe*, 4 *Edw. Ch. R.* 395.)

The wife's chattels real may be taken on execution, and sold for the debts of the husband, and, by this means, the title is transferred by operation of law from the wife to the creditor of the husband. (*Reeves' Dom. Rel.* 22. 2 *Kent's Com.* 134. *Miller v. Williams*, 1 *P. Wms. R.* 258.)

§ 241. It seems to be settled that where the husband survives his wife, and, upon that event, becomes entitled to her term for years, he succeeds to them, subject to all charges and equities with which they were affected in her possession, so that if the wife has before marriage subjected her terms to an annuity, or other incumbrance, and her husband, either after her marriage or after her death, has renewed the leases, or surrendered the old, and taken new leases, the incumbrances in equity will attach upon such new leases, and the creditors will not be bound to contribute toward fines or expenses, in consequence of the transactions. (*Moody v. Matthews*, 7 *Ves. Jr. R.* 174. *Vide Winslow v. Tighe*, 2 *Ball & Beat. R.* 195. *Stubbs v. Roth*, *Ib.* 548.)

If the husband is entitled to a term of years in his wife's right as executrix or administratrix, and have the reversion in fee in himself, the term will not be merged, because a man may have a

freehold in his own right, and a term for years in *autre droit*; and it seems essential to a merger that the term and the freehold should vest in a person in one and the same right. (1 *Bright's Husband and Wife*, 97, and authorities there cited.) As the husband is entitled to administer in his wife's right, where she is executrix or administratrix, he has a power of disposition over terms for years vested in her in such right. (*Arnold v. Bidgood*, *Cro. Jac.* 318.) So if a residue of a term of years be vested in the wife, as administratrix, her husband may release it, and his release would be good. (*Levick v. Coppin*, 2 *Wm. Bl. R.* 801. *S. C.* 3 *Wils. R.* 277.)

§ 242. Should a wife, at the time of her marriage, be a lessee for years, and her husband should take a lease of the land during the lives of both him and his wife, that act would amount to a disposition of the term, and the rights of the wife, by survivorship, would be thereby defeated, because, by the acceptance of the second lease, the term would be surrendered by operation of law. (1 *Bright's Husband and Wife*, 105.) So where a lease was granted to husband and wife for a term of years, and, after they entered, the lessor enfeoffed the husband, who died seised during his wife's life, it was held that this extinguished the term, and defeated the wife's right of survivorship, for the reason that, by such acceptance, the husband admitted the lessor's power to enter and make livery, which he could not lawfully do during the continuance of the term, so that, of necessity, this admission by the husband amounted to a surrender of the term. (*Downing v. Seymour*, *Cro. Eliz.* 912.)

If the husband mortgages the wife's term, as he may lawfully do, and neglects to pay the money when due, the estate of the mortgagee becomes absolute, and the wife's legal right by survivorship is defeated. (*Vide Radford v. Young*, 4 *Vin. Abr.* 50, *pl.* 15.) But if the equity of redemption be reserved to the husband and wife, she will be entitled to it by survivorship. (*Pitt v. Pitt*, *Turn. & Russ. R.* 180. *Jackson v. Parker*, *Ambler's R.* 687. *Clark v. Burgh*, 2 *Col. N. C. C.* 221. 9 *Jur.* 679.)

The husband's agreement to mortgage the wife's term will only be enforced against her to the extent of the money due. (*Bates v. Dandy*, 2 *Atk. R.* 207.)

The husband may forfeit the term of his wife, and thus defeat her right of survivorship, by his misconduct, as by committing waste; and, if he have a term of years in his own right, and

another in right of his wife, his forfeiture will extend to and comprehend both the terms. (1 *Bright's Husband and Wife*, 110.)

These are among the acts other than express alienation, by which the husband may divest his wife's chattels real, and defeat her right by survivorship.

§ 243. If the husband alone grant an under-lease of his wife's term of years, reserving a rent, that would be a good demise, and bind the wife so long as the sub-demise continued, and in case of the death of the husband before the wife, his executors would be entitled, not only to the subsequent accruing rents, but to the arrears due at his death, to the exclusion of the surviving wife; and the same rule would prevail in case the wife had been a party to the under-lease, provided the rent was reserved to the husband only, because the effect of the sub-demise and reservation was an absolute disposition *pro tanto* of the wife's original term, which she could not avoid, and the rent was the sole and absolute property of the husband. But if the rent was reserved to husband and wife in such a case, the surviving wife would be entitled to the future rents, and also to the arrears at her husband's death; because, as they remained in action, and were due in respect of the joint interest of the husband and wife in the term, they would, with their principal, the term, survive to the wife. (1 *Bright's Husband and Wife*, 43, 44.)

If arrears of rent accrued while the wife was single, and her husband gave an acquittance for what became due after the marriage, and then died, the discharge would prevent his wife from recovering the arrears which were due at the time of the marriage, unless she could prove that the prior arrears remained unsatisfied. If the husband's acquittance be under seal, then it will bar the wife; if not under seal, it is merely a presumptive bar. (*Merten v. Hopkins*, *Dyer's R.* 271.)

Such is the doctrine at common law with respect to the interest which the husband has in the personal property of his wife, and in her chattels real, and the leading common law principles which apply to the subject. The changes which have been made by the statutes of several of the states will be fully considered hereafter. It ought to be stated, however, in this connection, that, although the personal property belonging to the wife at the time of her marriage, as a general rule, passes at once to the husband, under and in virtue of the marriage, yet it sometimes happens that the

marital right of the husband is excluded by some express or implied trust, for the sole and separate and exclusive benefit of the wife; in which case the husband has no right to appropriate the property to his own use. Such a trust may be contained in the provisions of a settlement, or by a trust-deed, or by the will of a third person; or the trust may be implied from the very nature and character of the gift itself. Gifts made after marriage by third persons may also be expressly given for the sole and separate use of the wife, independent of her husband; and when so given, if the husband consents to her receiving the gifts, he and his creditors are bound by the trust. This subject will be more especially considered hereafter. But if there be no such trust, then, as has been suggested, the husband becomes entitled to the wife's personal property by the marriage, and immediately after the marriage may appropriate the same to his own use (*In the matter of Grant*, 5 *Law Reporter*, 11), although there is a species of personal property given to the wife by third persons during coverture which does not pass to the husband. For example, mourning rings and the like, given by third persons to the wife since her marriage, are, from their very nature and character, purely personal, and, as memorials of the dead, and also of the affection of the living, they are sacred, and cannot be touched either by the husband or by his creditors. (*In the matter of Grant*, *supra*.)

CHAPTER XXI.

THE INTEREST OF THE HUSBAND IN HIS WIFE'S CHOSSES IN ACTION IN POSSESSION—THEIR REDUCTION INTO POSSESSION BY THE HUSBAND—EFFECT OF JUDGMENTS AND DECREES IN VESTING THEM IN HUSBAND—SURVIVORSHIP OF WIFE, HOW BARRED—HER LEGACIES AND DISTRIBUTIVE SHARES—HER EQUITIES.

§ 244. MARRIAGE is only a qualified gift to the husband at common law, of the property of his wife, falling under the description of chosses in action, which comprises debts owing to her, promissory notes, legacies, residuary personal estate and the like. This species of personal property belongs to the husband by the marriage, upon condition that he reduce it into his possession during

coverture, and if he happens to die before his wife, without having reduced such property into possession, she and not his personal representatives will be entitled to it. (*Screven v. Blunt*, 7 *Ves. R.* 294. *Langham v. Newry*, 3 *ib.* 467. *Kitsinger's Estate*, 2 *Ashm. R.* 455. *Poindexter v. Blackburne*, 1 *Iredell's [N. C.] Eq. R.* 286. *Snowhill v. Snowhill, Executor*, 1 *Green's [N. J.] Ch. R.* 30. *Richards v. Richards*, 22 *Eng. C. L. R.* 119. *Gaters v. Madeley*, 6 *Mees. & Wels. R.* 423. *Legg v. Legg*, 8 *Mass. R.* 99. *Whitaker v. Whitaker*, 6 *Johns. R.* 112. *Glasgow v. Sands*, 3 *Gill. & Johns. [Md.] R.* 96. *Killcrist v. Killcrist*, 7 *How. [Mass.] R.* 311. *Banks v. Marksbury*, 3 *Litt. [Ky.] R.* 282.)

But at common law, the husband during coverture has the absolute right to receive his wife's choses in action, and dispose of them at pleasure, the same as though he became possessed of the same by purchase; and he may sue and collect them in his own name, when they accrue during coverture, and in the name of himself and wife, when they belonged to the wife at the time of the marriage, and when collected the avails are his absolute property. (*Authorities above cited, and 2 Kent's Com.* 135.)

In the State of Pennsylvania, marriage has always been treated as only a conditional gift of the wife's choses in action, or a gift to the husband of her power to dispose of them to himself or any one else, by force of the dominion to which he has succeeded as the representative of her person, and because the gift is conditional he has a right to reject it by refusing to perform the condition; and hence, clear proof that a husband received his wife's money as a loan, or a disclaimer of intention to make it his own property, proved by his admissions, will then preserve her rights of survivorship. The rule that a gift always requires the assent of the donor is held to apply in such a case. (*Gochenaur's Estate*, 23 *Penn. R.* 460.) And in the State of Ohio, it has been held that a promissory note given to the wife before or during coverture, continues to be the property of the wife until the assertion by the husband of his marital rights. (*Hoop v. Plummer*, 14 *Ohio St. R.* 448.)

§ 245. Upon this subject it was said by the chief justice in the State of Kentucky, in a case involving several important questions connected with it, that "the choses in action of the wife at the time of her marriage vests in the husband *sub modo* only; that is on condition that he reduce them to possession, or otherwise dispose of them *effectually* during coverture. If the wife survive,

no such disposition having been made, they survive to her; but if the husband survive, he may be entitled to them as her administrator; and the statute of distribution having been construed as not applying to him, he may, therefore, after paying her debts, appropriate them to his own use, whenever recovered by him as her administrator. And hence it has been decided as a settled doctrine, that if any other administer, the husband will be entitled to the residue remaining after the debts of his wife are paid." And it was further observed: "But as the wife has no legal capacity to take in her own right during coverture, a *chose in action* which accrues to her while she is covert vests absolutely and *eo instanti*, in her husband by operation of law. And hence; it was long doubted whether, if she survived her husband, such a *chose in action* would belong to her as survivor. It has been determined, however, that in most cases it would." (*Jones' Administrator v. Warren's Administrator*, 4 *Dana's R.* 333. *Vide also Harris v. Culver*, 9 *B. Mon. R.* 365. *Philiskirk v. Pluckwell*, 2 *Maule & Selw. R.* 396.)

This doctrine is well settled at common law, and innumerable authorities, both ancient and modern, might be referred to, in which it is enunciated, but it is considered unnecessary. So rigid is the rule, that it has been held that the wife cannot receive a valid payment on her own choses in action, except as the agent of her husband. (*Thrasher v. Tuttle*, 22 *Maine R.* 335.)

§ 246. The bare reduction into possession, by the husband of a wife's choses in action, is not in all cases conclusive, though it is *prima facie* evidence of a conversion to his use; but the presumption of interest may be repelled by proof that he held the same, or the avails thereof, as her trustee, for which to be accountable. (*Hinds' Estate*, 5 *Wheat. R.* 138.) Under such or similar circumstances, an actual possession by the husband will not vest him with the property, for he must have reduced it to his possession as husband, and not in any other capacity, as executor, administrator, or trustee. (*Mayfield v. Clifton*, 3 *Stew. R.* 375. *Baker v. Hall*, 12 *Ves. R.* 497. *Well v. Tomlinson*, 16 *ib.* 413. And *vide Lodge v. Hamilton*, 2 *Serg. & Rawle's R.* 491. *Ex parte Ebers*, 3 *Dessau. [S. C.] R.* 155. *Sturgingeyer v. Hannah*, 2 *Nott & McCord's [S. C.] R.* 147.) So, if he should receive her money as a loan, he would not get an absolute title to it, and should his wife survive him, her right to it would not be barred by her husband's

possession. (*Gochenaur's Estate*, 23 Penn. R. 460. *Gray's Estate*, 1 ib. 328.)

The right of the husband to reduce to possession his wife's choses in action cannot be exercised by a guardian appointed over him as an insane person; and in such a case the property continues vested in the wife. (*Andover v. Merrimack County*, 37 N. H. R. 438.)

It has been said that the necessity of a reduction to possession, in order to vest the wife's choses in action, applies only to such rights as accrue *before* marriage, for if they accrue *during* coverture, as notes made to her in her own name, according to the American cases, they become the property of the husband absolutely, and on his death pass to his representatives, although the wife survive him. (*Savage v. King*, 17 Maine R. 301. *Commonwealth v. Manly*, 12 Pick. R. 173. *Swan v. Grey*, 1 Hayw. [N. C.] R. 3. *Jones v. Warren*, 4 Dana's R. 333. *Little v. Marsh*, 2 Ired. Eq. R. 18. *Cornwall v. Hoyt*, 7 Conn. R. 420. *Middleton v. Mather*, 15 ib. 598.) The rule, however, seems to be different in England. There it would appear that a promissory note given to the wife during coverture is not a personal chattel vesting in the husband *absolutely*, and that such a note would survive to the wife unless the husband by some act reduced it to possession during coverture; and the same is the rule when the consideration was advanced by the wife; in that case, the note would survive to the wife, except it be reduced to possession during coverture by the husband. (*Vide Gaters v. Madely*, 6 Mees. & Wels. R. 423. *Richards v. Richards*, 22 Eng. C. L. R. 121. *Scarpillini v. Atcheson*, 53 ib. 874.) And it has been held in this country, that if the note is payable to husband *and* wife, unless collected during coverture, it would survive to the wife in case of the death of the husband. (*Richardson v. Daggett*, 4 Vt. R. 336. *Draper v. Jackson*, 16 Mass. R. 480.) In the last case cited, Jackson, J., in delivering the opinion of the court, said, "The question is, whether a note and mortgage made to a man and his wife shall, in case she survives him, go to his administrator or his widow. In considering this question, we except the case of a voluntary gift by a husband to his wife, as when he advances his own money or other property, and takes for it a note or bond to himself and his wife. This, like every other voluntary conveyance, would, without doubt, be void as against the creditors of the husband. But when no such fact

appears, the law seems to require that the wife shall have the note or bond if she survives." (*Draper v. Jackson*, 16 *Mass. R.* 482.)

§ 247. The possession by the husband of the wife's choses in action is the possession of the wife. This must be so from the fact that, in law, they are one person, and, *vice versa*, the possession of the wife is the possession of the husband. (*McNeill v. Arnold*, 17 *Ark. R.* 154. *Lee v. Matthews*, 10 *Ala. R.* 682.) This principle has its application in the case of a security taken by a husband in the name of his wife. Under such circumstances, it has been held that the taking the security in her name, constitutes a gift, and its retention in his custody is a delivery to him, and upon his death it belongs to her absolutely and not to his estate. (*Scott v. Simes*, 10 *Bosw. R.* 314.) In one of the cases hereinbefore cited, a note was given to the wife during coverture. Parke, B., says: "When a chose in action, such as a bond or note, is given to a *feme-covert*, the husband may elect to let his wife have the benefit of it; or, if he thinks proper, he may take it himself; and if in this case a husband had in his life-time brought an action upon the note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he please, leave it as it is, and in that case the remedy on it survives to the wife." (*Yates v. Madeley*, 6 *Mees. & Wels. R.* 423. *Vide also Hart v. Stephens*, 6 *Queen's B. R.* 937.) And in another of the cases referred to, a *feme-covert*, being an administratrix, received a sum of money in her character of administratrix and lent it to her husband, and took in return for it the joint and several promissory note of her husband and two other persons, payable to her with interest; and the court held that, although the wife could not have maintained an action on the note during the life-time of her husband, the note was a chose in action surviving to the wife, and that she could bring her action upon it on the death of her husband. (*Richards v. Richards*, 22 *Eng. C. L. R.* 119.)

In another case in the English courts, where the husband transferred two sums of bank annuities into the names of himself and wife, and died in her life-time, the court held that the wife, surviving her husband, became absolutely entitled to the stock, there being nothing to show that the husband intended that the transfers should have any operation but what they legally had. (*Dummer v. Pitcher*, 5 *Simon's R.* 35.) And still another and much older

case may be cited, in which the husband had lent out money in the names of himself and wife, upon bond and mortgage to him in their joint names, and the court held that the wife must be regarded as a joint purchaser and entitled to the securities by survivorship. (*Christ's Hospital v. Budgin*, 2 Vern. R. 683. *Vide also Nash v. Nash*, 1 Mad. C. C. 133.) These cases have been held to be good authority by the courts of this country, and go to show that a married woman is not disabled from being the beneficiary of a promise during coverture; she may be merely a promisee for her husband's benefit during his life, if he chooses to enforce it. But if he neglects to do it, the moment she becomes *sui juris* by the termination of the matrimonial relation, she can enforce her rights in her own name. (*Vide Scott v. Simes*, 10 Bosw. R. 314, 324. *Gibson v. Todd*, 1 Rawle's R. 455.)

§ 248. It is sometimes an important question as to what constitutes a *reduction to possession* of the wife's choses in action by the husband. A mere intention to do so, or a simple appropriation of the fund, will be insufficient. (*Blunt v. Bestland*, 5 Ves. R. 515.) So it is well settled that the mere receipt of *interest* on the wife's choses in action is not sufficient. (*Hunt v. Stephens*, 51 Eng. C. L. R. 939. *Stanwood v. Stanwood*, 17 Mass. R. 57. *Hunter v. Hallett*, 1 Edw. Ch. R. 388.) Nor is the mere fact that the husband joined with the wife in giving a receipt for the principal sufficient. (*Timbres v. Katx*, 6 Watts & Serg. R. 290. *Vide Burnham v. Bennett*, 9 Jur. 888.) The husband's taking the dividends of stock standing in the wife's name only reduces the dividends, and not the stock, into his possession. (*Burr v. Sherwood*, 3 Brad. R. 85.)

The acts to effect the transfer must be such as to change the property in the chose in action, or something which will divest the wife's right, and make that of the husband absolute. It is understood, however, that any act which clearly shows an intention on the part of the husband to make use of the property as his own, as mortgaging, releasing, taking a new security for the debt, procuring a judgment in his own name, appointing another to receive the amount, who actually receives it, is a sufficient act of ownership to reduce the property to the husband's possession, and bar the wife's right. (*Schuyler v. Hoyle*, 5 Johns. Ch. R. 196. *And vide Stewart's Appeal*, 3 Watts & Serg. R. 376. *Forrest v. Warrington*, 2 Dessau. R. 254. *Moelpir's Appeal*, 2 Barr's R. 71.) Pledging

the wife's note as security for a temporary loan is not evidence of the husband's intention to appropriate it; and a redemption of it by him places it in all respects in *statu quo*. This is not such a reduction of the note into the possession of the husband as will destroy the wife's interest in it. Neither will the chose in action be considered reduced by the husband to his possession merely by having the actual possession of the instrument. It is necessary that the money should be actually received by him, or by a third person as his agent, for his use; or that a judgment should be recovered and an execution issued in the name of the husband and wife, or in the name of the husband alone. (*Latourette v. Williams*, 1 Barb. R. 9. *Vide also Hartman v. Dowdel*, 1 Rawle's R. 279.) But a legal or equitable assignment by the husband of the wife's *chose in action*, for value, is such a reduction of the title into possession as would bar the wife's right of survivorship; and an equitable assignment as collateral security for a present advance of money defeats the wife's right of survivorship, though merely pledging the *chose in action* does not have that effect. (*Tritt v. Colwell*, 31 Penn. R. 228.)

§ 249. If the husband receives the fund which was owing to the wife, or if he, or he and his wife, authorize a person to receive it, who actually obtains it, either of such modes of receipt will change the wife's interest in the property, and will be a reduction of the chose in action into the possession of the husband, divested of her title to it upon surviving him; and he may maintain an action for the money so received by the person authorized. (1 *Bright's Husband and Wife*, 53, and authorities there cited).

When the husband was a lunatic, the payment into court of the wife's chose in action to the credit of the lunacy, was held to amount to a reduction into possession. (*In re Jenkins*, 5 Russ. R. 183.)

The transfer of the wife's stock into the names of the husband and another, in trust for the separate use of the wife, is not a reduction of the property into the possession of the husband which will entitle his representatives to hold it to the exclusion of his wife surviving, for it is regarded as simply made *diverso intuitu*. But a transfer of the wife's stock into her husband's sole name, will be a reduction of it into his possession, and defeat the wife's right by survivorship, because such a transfer is considered equivalent to a receipt of the money by the husband, and an act vesting the

sole property in him. (*Wall v. Tomlinson*, 16 *Ves. R.* 413.) An assignment by the husband, under the insolvent laws, vests in the assignors the personal estate of the wife in action, unless the same is secured to her as her separate property. But the assignee takes the legal interest subject to the wife's right by survivorship, if the husband dies before the assignor has reduced such property to possession. The assignee also takes the assignment of the wife's estate in action, subject to her equitable claim thereon, for the support of herself and infant children, if she has no other sufficient means for that purpose; provided such claim is asserted by the wife, or a suit is instituted in a court of equity for the recovery of such property, before the assignee has reduced it to possession. (*Van Epps v. Van Deusen*, 4 *Paige's Ch. R.* 64, 73, 74. *Harper v. Ravenhill*, 1 *Tamlyn's R.* 144. *Pierce v. Thornely*, 2 *Sim. R.* 167. *Henner v. Morton*, 3 *Russ. R.* 65, 90. *Steinmiz v. Halthin*, 1 *Glyn & Jameson's R.* 64. 2 *Kent's Com.* 193. *Vide also Mitford v. Mitford*, 9 *Ves. R.* 87. *Outcale v. Van Winkle*, 1 *Green's Ch. R.* 516. *Matheney v. Guess*, 2 *Hill's [S. C.] Ch. R.* 66. *Hartman v. Dowdel*, 1 *Rawle's R.* 279.)

The assignees of a bankrupt cannot maintain an action in their own name in a chose in action, made to the wife when sole. (*War-rington v. Yates*, 12 *Mees. & Wels. R.* 855.)

A voluntary assignment by the husband, without consideration, is not a bar to the wife's right of survivorship. (*Burnett v. Kinas-ten*, 2 *Vern. R.* 401. *Judson v. Moulson*, 2 *Atk. R.* 420. *Caseoll v. Carroll*, 11 *Wheaton's R.* 134. *Parsons v. Parsons*, 9 *N. H. R.* 321.)

§ 250. It would seem from authority that the husband cannot assign the wife's *contingent* interest in a chose in action, even for a valuable consideration, so as to deprive her of her right of survivorship. (*Terry v. Brandon*, 1 *Rich. Eq. R.* 78. *And vide Maywood v. Johnston*, 1 *Hill's Ch. R.* 228.) And in a case where the husband and wife assigned for a valuable consideration a moiety of a share of an ascertained fund in which the wife had a vested interest in remainder, expectant on the death of a tenant for life, and the husband died, the wife and tenant for life being still living, it was held that she might claim the whole share, as against the assignee. (*Purden v. Jackson*, 1 *Russ. R.* 1.)

In another case, the husband and wife assigned the interest in certain trust stock to which she would be entitled on the death of

her mother, as a security for the payment of an annuity granted by the husband. The husband afterward took the benefit of the insolvent debtor's act, and a general assignment of his property was made under it. The wife's mother, on whose death the stock was to be vested in her, died, and afterward the husband died without having done any act, or instituted any proceedings, to reduce the trust fund into possession. It was held that neither the assignee under the insolvent debtor's act, nor the annuitant, was entitled to the fund, but that it belonged to the surviving wife. (*Hernsby v. Lee*, 2 *Mad. C. C. R.* 16. *And vide Mitford v. Mitford*, 9 *Ves. R.* 87.) The same doctrine has been recognized as sound in a very late case in England, and although it is directly repugnant to several of the older cases, the better opinion is, that the husband cannot possibly make an assignment of the reversionary interest of his wife in a chose in action, so as to bar the wife as survivor, provided the interest continues reversionary until the death of the husband. (*Ashley v. Ashley*, 1 *Collyer's R.* 553. *Vide also Ellison v. Elwin*, 13 *Sim. R.* 309, and *Morley v. Wright*, 11 *Ves. R.* 19.)

§ 251. It has been held that when the wife was entitled to a reversionary interest in a fund, payment of it to the husband during the life of the person on whose death she would be entitled to it, amounted to a reduction into possession by the husband, so as to bar his wife's right by survivorship. (*Dowell v. Earle*, 12 *Ves. R.* 473.) And it has been held that when the wife's reversionary chose in action is expectant upon a prior life interest, the assignment or surrender of the life interest to the wife will have the effect of accelerating the reversionary interest, or converting it into an immediate estate so as to enable the husband to reduce it into possession. (*Lachton v. Adams*, 5 *Law Jour. N. S. ch.* 382. *Hall v. Hugonin*, 14 *Sim. R.* 598. 16 *Law Jour. N. S. ch.* 14. 10 *Jur.* 940.) It seems, however, that no acceleration of the reversionary interest will take place when the prior interest is vested in the husband alone. (*Richards v. Roberts*, 3 *Mad. R.* 384.) And the same doctrine seems to be held in case the interest is vested in the husband and wife. (*Hall v. Hugonin*, *supra*.) It would seem to follow from the authorities, that if the whole interest in the fund by any means becomes vested in the wife, it may be reduced into possession by the purchaser; although Mr. Bright thinks the doctrine can hardly be considered as fully established. (1 *Bright's Hus. and Wife*, 60.)

§ 252. The husband's taking a new security in the name of the wife, for a debt due to her at the time of the marriage, is not such a reducing of the debt into possession as to extinguish the wife's right of survivorship. But if the husband receives the debt due to the wife, or novates it by taking a new security for it in his own name, the wife's right is extinguished, and the new security goes to his representatives. (*Searing v. Searing*, 9 *Paige's Ch. R.* 289.)

The bringing of a suit by the husband alone, to recover the proceeds of the sale of his wife's real estate, is such a reduction to possession as will defeat the wife's estate, and this notwithstanding the death of the husband after verdict but before judgment. (*Teneick v. Flagg*, 5 *Dutch. [N. J.] R.* 25.)

When the consideration of a bond or other security proceeds from the wife, or her estate, or when it is the gift of a third person to her, and the husband does not collect the money or dispose of the security, or proceed to judgment in his own name, in his life-time, the security will go to the wife by survivorship. But if in such a case, the husband elects to treat the security as his own, by bringing suit in his own name only, the judgment recovered in his life-time will belong to his estate, although the wife survives him. It is otherwise, however, if he sues in the joint names of himself and wife, and she survives him. (*Moehring v. Mitchell*, 1 *Barb. Ch. R.* 624. *Thompson v. Ellsworth*, *Ib.* 624.) The naming or not naming the wife in an action is attended with material consequences in relation to this subject, for if she be a party and the husband die after judgment, and before execution sued out, the judgment will survive to her, and she will be entitled to enforce the judgment. (*Bond v. Simmons*, 3 *Atk. R.* 21.) But if the action be brought by the husband alone, and he die after judgment, his representatives, and not the wife, will be entitled to the benefit of the judgment. (*Oglander v. Baston*, 1 *Vern. R.* 396.) And costs ordered by rule of court to be paid to husband and wife, have been held to survive to her. (*Tiff v. Bartlett*, *Hanmer's R.* 104.) It may be laid down as a general rule that in all cases where it is necessary to bring the suit in the joint names of the husband and wife during coverture, the cause of action survives to the wife for her benefit. (*Searing v. Searing*, *supra*.)

§ 253. A judgment obtained by the husband alone in this respect being so much more advantageous for him, it may be useful to inquire in what cases he may or may not sue without

making his wife a party. It may be considered a general rule at common law that the husband may commence proceedings at law in his own name only for all personal estate in actions which accrued to his wife, or to her and him jointly, during coverture, and in respect to all personal contracts or covenants made or entered into with them during the marriage; because the rights of action accrued after marriage, and the husband might disagree to the wife's interest, and make his own absolute, an intention to do which he manifests in bringing an action in his own name when it might have been commenced in the names of both him and his wife. (*Gates v. Madeley*, 6 *Mees. & Wels. R.* 427.) All of the text writers agree upon this subject, and yet it may be convenient to refer to a few cases where the rule has been held to apply.

If a bill or note be given to husband and wife, he alone may bring an action for the recovery of the money due. (*Shuttlesworth v. Noyes*, 8 *Mass. R.* 229. *Barlow v. Bishop*, 1 *East's R.* 432. *Day v. Padrone*, 2 *Maule & Selw. R.* 396. *Howell v. Maine*, 3 *Lev. R.* 403. *Copin v. —*, 2 *P. Wms. R.* 497. *Burrough v. Moss*, 21 *Eng. C. L. R.* 128. *Aukerstein v. Clarke*, 4 *Term R.* 616.)

The husband may sue alone on notes and bonds given to the wife during coverture, as well as those given to him and wife. (*Philliskirk v. Pluckwell*, 2 *Maule & Selw. R.* 393.)

So the action may be brought in the name of the husband alone, on a contract or covenant to himself and wife. (*Brown v. Lane*, 2 *Mod. R.* 217.)

When the interest of the wife in the distributive portion of a deceased person's estate accrues after marriage, the husband may bring his action to recover it in his own name without joining the wife. (*Henderson v. Grey*, 6 *Smedes & Marsh. R.* 209.)

It has been held in Massachusetts that a legacy accruing to the wife either before or during coverture, may be recovered by the husband in his own name. (*Hopgood v. Houghton*, 22 *Pick. R.* 480.) But in the State of Kentucky, it was held that, in an action to recover the wife's interest in a residuary devise, the husband and wife must join. (*Darnell v. Adams*, 13 *B. Mon. R.* 273.)

A similar doctrine prevails in Ohio. In that state it has been held that the husband cannot collect a legacy in his own right, accruing to the wife during coverture, after the decease of the wife. (*Curry v. Fulkinson*, 14 *Ohio R.* 100.)

If husband and wife demise for years the wife's estate, reserving a rent, the husband may bring his action alone for the recovery of arrears. (*Brown v. Lane*, 2 *Mod. R.* 217.)

Where a lease is granted to husband and wife, and the husband underlets, the wife need not be joined in the action against the lessee for an injury to the reversion. (*Wallis v. Harrison*, 5 *Mees. & Wels. R.* 142.)

The rents, issues and profits of a wife's real estate, which accrue during coverture, belong absolutely to the husband, and, of course, he need not join his wife in an action for their recovery. (*O'lapp v. Houghton*, 10 *Pick. R.* 463. *And vide Jones v. Patterson*, 11 *Barb. R.* 572.) There are many cases in which either the husband may sue alone, or the husband and wife may join, and some of the foregoing are cases of this kind; and, in all these cases, if judgment is recovered in the name of the husband, alone, the wife has no right by survivorship; but, if the judgment be obtained in favor of the husband and wife jointly, and the husband dies before execution sued out, the judgment will survive to the wife, as has been before stated. (*Ante*, § 252.)

§ 254. Where an obligation or contract is taken to the husband and wife, or to the wife alone, with the assent of the husband, the action survives to the wife, who is entitled to the proceeds, as against the heirs and personal representatives of the husband. In such a case the form of the security implies a design by the husband to benefit the wife, and the law will give effect to this intention when the interest of creditors is not affected. Indeed, an agreement with a *feme-covert*, and a promise to her, personally, raises the presumption that she is the meritorious cause of such agreement, and it will survive to her. This is held to be the rule at law, as well as equity. (*Borst v. Spelman*, 4 *N. Y. R.* 284. *Draper v. Jackson*, 16 *Mass. R.* 483, 486.)

Where a husband, as a consideration for his wife's joining in his deed of his own land, permitted her to invest a part of the purchase-money in her own name, and assented that she treat it as her own, and reinvest it in her own name, money belonging to her before marriage, it was held that she took all the securities by survivorship. (*Searing v. Searing*, 9 *Paige's Ch. R.* 283.)

Where a lease is executed, by husband and wife, of land in which the wife has an estate for life, and the lessee covenants, in turn, to pay rent to both, this, of itself, is sufficient to entitle the hus-

band and wife to join in an action for the rent, notwithstanding the wife did not acknowledge the execution of the lease, and, therefore, was not bound by it. And, it is held, that one effect of uniting the wife in such an action is, that upon the death of the husband his interest in the cause of action survives to the wife, and no interest vests in the personal representatives of the husband. By uniting the wife, the husband signifies his assent to giving her such an interest in the cause of action, and he thereby vests the wife with his interest, in the event of his death. (*Jacques v. Short*, 20 Barb. R. 269.) So when money is secured to the husband and wife by a promissory note, or certificate of deposit, no other facts appearing, the wife is held to be entitled to survivorship in the money. (*Orphan Asylum v. Strain*, 2 Bradf. R. 34.) And so, also, an agreement to pay to husband and wife, during the life of the longest liver, a given sum, survives to the wife after the death of the husband, and it is held that she may assign it. (*Prindle v. Caruthers*, 15 N. Y. R. 425. *Vide also Pike v. Collins*, 23 Maine R. 38. *Stuckey v. Keefe's Exr.* 26 Penn. R. 397. *Torrey v. Torrey*, 4 Vern. R. 430.)

§ 255. All legacies to the wife, and distributive shares in an intestate's estate, which accrue to the wife during coverture, at common law, become the absolute property of the husband, if reduced to possession in his life-time, the same as the other choses in action of the wife. (*Cera v. Taylor*, 10 Ves. R. 578. *Lampkin v. Creed*, 8 ib. 599. *Garforth v. Bradley*, 2 Ves. Sen. R. 675. *Palmer v. Trevor*, 1 Vern. R. 261. *Schwylar v. Hoyle*, 5 Johns. Ch. R. 196. *Tucker v. Gordon*, 5 N. H. R. 564. *Hapgood v. Houghton*, 22 Pick. R. 480. *Goddard v. Johnson*, 14 ib. 352. *Hayward v. Hayward*, 20 ib. 517. *Cannon v. Ulmer*, 1 Bai. [S. C.] Eq. R. 204. *Revel v. Revel*, 2 Dev. & Batt. R. 272. *Galleyo v. Galleyo*, 2 Brock. R. 285. *Adams v. Larendon*, McC. & You. R. 41. *Poindexter v. Blackburn*, 1 Ired. Eq. R. 286. *Hurdell v. Colten*, ib. 61. *Clifton v. Haig*, 4 Dessau. R. 330. *Fleury v. Baker*, 2 Barr's R. 470. *Ross v. Wharton*, 10 Yerg. [Tenn.] R. 190. *Wintercast v. Smith*, 4 Rawle's R. 177. *Snowhill v. Snowhill*, 1 Green's Ch. R. 30.)

As there are some principles peculiar to this branch of the subject, it may be well to refer to some points settled by the authorities in relation to the wife's legacies and distributive shares.

A legacy to the wife will not pass by an assignment of the husband, for the benefit of his creditors, of all his personal property

in possession or in action. (*Skinner's Appeal*, 5 *Barr's R.* 262.) Some authorities hold, however, that such legacies or distributive shares vest absolutely in the husband, without any reduction to possession, and that the husband may sue for them in his own right, either before or after his wife's death. (*Commonwealth v. Manly*, 12 *Pick. R.* 173. *Goddard v. Johnson*, 14 *Pick. R.* 352. *Hapgood v. Houghton*, 22 *ib.* 480. *Griswold v. Penniman*, 2 *Conn. R.* 564. *Morgan v. Thames Bank*, 14 *ib.* 102. *Early v. Sherwood*, 1 *Dud. [Geo.] R.* 7. *Lowry v. Houston*, 3 *How. [Miss.] R.* 224. *Wade v. Grimes*, 6 *ib.* 425. *McGee v. Ford*, 2 *Smedes & Marsh. [Miss.] R.* 769.) But the better opinion is, that unless such legacies or distributive shares are reduced to possession by the husband during coverture, they survive to the wife. (*Hayward v. Hayward*, *supra.* *Curry v. Fulkinson*, 14 *Ohio R.* 100. *Wheeler v. Moore*, 13 *N. H. R.* 159. *Parsons v. Parsons*, 9 *ib.* 321. *Marston v. Carter*, 12 *ib.* 159. *Wallace v. Taliaferro*, 2 *Call's [Va.] R.* 447. *Harleston v. Lynch*, 1 *Dessau. R.* 244. *Clifton v. Haig*, 4 *ib.* 330. *Harper v. Archer*, 8 *Smedes & Marsh. R.* 229. *Galleyo v. Galleyo*, *supra.* *Revel v. Revel*, 2 *Dev. & Batt. R.* 272. *Schuyler v. Hoyle*, 5 *Johns. Ch. R.* 196.)

In some of the states it has been held, that such legacies and distributive shares may be attached by the husband's creditors, even before distribution is made. (*Wheeler v. Bowe*, 20 *Pick. R.* 563. *Holbrook v. Waters*, 19 *ib.* 354. *Griswold v. Penniman*, *supra.*) But the doctrine has been in other states expressly condemned as unsound, and the contrary rule is confidently asserted. (*Wheeler v. Moore*, *supra.* *Short v. Moore*, 10 *Vt. R.* 446. *Dennison v. Nigh*, 2 *Watt's R.* 90. *Robinson v. Woelpper*, 1 *Wharton's R.* 179. *Kilby v. Haggin*, 3 *J. J. Marsh. [Ky.] R.* 215.) And in Massachusetts it is held, that if the husband die before judgment, the wife's right of survivorship is not barred. (*Strong v. Smith*, 1 *Metc. R.* 476.) After a decree of distribution, undoubtedly such share would be absolutely in the husband, and could be attached by his creditors. (*Parks v. Cushman*, 9 *Vt. R.* 320.) But no action at law can be sustained by the husband, or his assignee, either in his own name, or by joining the wife, to recover such share; the only remedy is in chancery. (*Howard v. Brown*, 11 *Vt. R.* 361. And *vide Bing. on Cov.* 209, note 5, where the authorities on the subject are cited.)

Payment of a legacy bequeathed to the wife generally, and not given to her separate use, to the wife, without the authority of the

husband, express or implied, will be void as to him. (*Palmer v. Trevor*, 1, *Vern. R.* 261. *Moses v. Levi*, 3 *Younge & Collyer's Ex. R.* 359. *Norris v. Hemingway*, 1 *Hagg. Ecc. R.* 5.)

§ 256. Decrees so far resemble judgments at law in respect to those matters, that until the money be ordered to be paid, or declared to belong to the husband, the wife's right will remain undisturbed; and as a joint judgment will remain to the wife if her husband die before execution is awarded, so will a joint decree until an order for payment, or declaring the money to belong to the husband. (1 *Bright's Husband and Wife*, 67. *McCauley v. Phillips*, 4 *Ves. R.* 15. *Murray v. Elibank*, 10 *ib.* 84. *Nanney v. Martin*, 3 *Atk. R.* 726. *Forbes v. Phipps*, 1 *Edward's Ch. R.* 502.)

An award has not the effect of changing the property in chattels personal of the wife into the husband. Unless the award is carried into effect by some act amounting to a reduction into possession of the choses in action of the wife, the wife surviving the husband will not be bound. (*Hunter v. Rice*, 15 *East's R.* 100. *Thorpe v. Eyre*, 1 *Ad. & El. R.* 926.)

§ 257. Some general principles on which the rights of survivorship in these cases depend, have been succinctly stated thus: "The husband, by marriage, acquires a right to the use of the real estate of the wife during her life; and if they have a child born alive, then, if he survives, during his life, as tenant by the curtesy, he acquires an absolute right to the chattels real, and may dispose of them. If he does not dispose of them, and survives his wife, they survive to him; but if she outlives her husband, they survive to her. He acquires an absolute property in her chattels personal in her possession; but as to her choses in action, he may maintain a suit jointly with her to recover them, and if he reduces them to possession during coverture, they become his, otherwise they survive to the wife if she outlives him, or to her administrator if she does not. As to the property accruing during coverture, the same rule is applicable except in regard to choses in action. These vest absolutely in the husband, on the principle that the husband and wife are but one in law, and her existence, in legal consideration, is merged in his. He may, in such cases, bring a suit in his own name without joining his wife. This clearly proves that the choses in action vest in him absolutely; for if the right was in the wife, she must necessarily join in the suit. When a bond or note is given to the wife, the husband can maintain an action in his own

name. The consequence then is, that if the husband die before the wife, such *choses in action* shall go to his executor or administrator, and they do not survive to the wife, for when the property has been absolutely vested there can be no survivorship.

“It is true, in certain cases, when claims originate during coverture, the husband may sue in his own name, or may join with the wife, as for rents issuing out of her real estate, or when she is the meritorious cause of action; and then, if the husband die while the suit is pending, or after judgment and before it is satisfied, the interest in the cause of action will survive to her, and not to the executor of the husband, though if he had sued alone she would have had no interest. But this, so far from proving that if no suit had been brought the *choses in action* would survive to the wife, proves directly the contrary. For in this case the joinder of the wife in the suit was the ground of the survivorship. It is agreeing to and recognizing her interest by the husband, and may be considered in the nature of a grant to her; and for this reason the suit or judgment may survive to her. That when no act is done by the husband, when no suit is brought or judgment rendered in favor of both, his separate absolute interest continues, and can never survive to the wife.” (*Griswold v. Pennington*, 2 Conn. R. 565.)

Choses in action of the wife not reduced to possession by the husband, survive to the wife after his death; and if she dies before she reduces such *choses in action* to possession, they go to her next of kin, and not to the representatives of her deceased husband. In Ohio, the husband is not the next of kin of his wife. (*Dixon v. Dixon*, 18 Ohio R. 113. *Needles v. Needles*, 7 Ohio St. R. 432. *Hoop v. Plummer*, 14 ib. 448.) It may be affirmed, however, that at common law, a husband is entitled to the personal property and *choses in action* of his wife, and they are vested in him at her death, whether reduced to possession or not, in virtue of his marital rights, and not of his rights to administration. (*Ryder v. Hulse*, 24 N. Y. R. 372.)

§ 258. In order that the wife's right of survivorship to her *choses in action* may be barred, they must be recovered by the husband during the coverture, whether they are legal or equitable; and yet there is a difference between a wife's legal and equitable *choses in action* which ought to be noticed. In cases where it is necessary for the husband or his assignees to have recourse to equity, that

jurisdiction will not give its assistance except upon the terms that a provision is secured out of the fund for the wife. In other words, a court of equity will not aid either the husband or his assignees to recover the wife's choses in action, unless a suitable provision is made from them for the wife. (*Duvall v. Farmers' Bank*, 4 *Gill & Johns*. [Md.] R. 282. *Whitesides v. Davis*, 7 *Dana's* [Ky.] R. 107. *Tiver v. Richardson*, 7 *Mon.* R. 660. *Faber v. Colden*, 1 *Paige's Ch.* R. 166. *Van Epps v. Van Deusen*, 4 *ib.* 64. *McElhatten v. Howell*, 4 *Hayw.* [Tenn.] R. 19. *Duer v. Boyer*, 2 *McCord's Ch.* R. 368. *Norris v. Lane*, 18 *Md.* R. 260.)

In one case quite recently decided in the English chancery, the vice-chancellor said: "Marriage is a gift to the husband of all the personal property to which the wife is entitled in possession, and of all the personal property to which she may become entitled, subject only to the conditions of his reducing it into possession during the coverture; and I am aware of no distinction in this respect between property to which the wife is entitled in equity, and property to which she is entitled at law. Nor upon principle can there be any distinction, the rule resting, as I conceive, upon this—that the husband and wife are in law one person—a rule which prevails in equity as much as at law. The wife's equity for a settlement, therefore, does not depend upon any right of property in her, and that it does not depend upon any such right of property is the more clear when it is considered to what limitation it is subject. The amount is discretionary in the court, and if the wife insists upon it, she must claim it for herself and her children, and not for herself alone—limitations which are wholly inconsistent with a right of property in her.

"The right, then, being thus independent of property, there seems to be no ground on which it can rest, except the control which courts of equity exercise over property falling under their dominion. It is, in truth, the mere creature of a court of equity, deduced, as I conceive, originally, when the husband sued, from the rule that he who comes into equity must do equity; and subsequently extended to suits by the trustees and the wife, probably from the necessity of the court administering the trust, whether the husband thought proper to sue or not. We must consider, then, when this obligation of doing equity is enforced by the court. It is not upon the bill filed; for the bill may be afterward dismissed. It is not, as I think, upon the decree being made, when

the plaintiff's interest is in reversion ; for in such cases the court only deals with the interest in possession. It is, I think, when the property comes to be distributed ; for then, and not till then, in ordinary cases, does the court enforce obligations attaching upon the property otherwise than by contract. This right to a settlement, therefore, I take to be an obligation which the court fastens, not upon the property, but upon the right to receive it, and that this is the case is, I think, the more clear from this consideration : if the right attaches at all, it must attach with all its incidents. One of its incidents is, that the wife waiving it must waive it by her consent in court ; but it is now settled that the court cannot take her consent to part with her reversionary interest." (*Osborn v. Morgan*, 9 *Hare's R.* 432, 433, 434. *S. C.* 41 *Eng. Ch. R.* 431.)

In another much earlier case, Sir William Grant, speaking of this right, says the ordinary occasion for it is, " where the husband applies to have paid to him money that belongs presently and immediately to his wife." (*Woollands v. Crowcher*, 12 *Ves. R.* 174.) And Sir John Leach is yet more distinct, for he says, " My opinion is, that a wife, by her consent in a court of equity, can only depart with that interest which is the creature of a court of equity—the right which she has in a court of equity to claim a provision by way of settlement on herself and children out of that property which the husband at law would take in possession in her right. Her equity arises upon his legal right to present possession. This principle has no application to a remainder or reversion ; when the remainder or reversion falls into possession, then the equity arises. If the wife, by her consent, could pass a remainder or reversion in personal property to her husband, she would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband ; and to give this effect to her consent, could make it analogous to a fine at law with respect to real estate—a principle always disclaimed in a court of equity. A court of equity interferes to protect the property of the wife against the legal rights of the husband, and will never lend itself as an instrument to enable the husband to acquire a right in the wife's personal property, which he can by no means acquire at law." (*Pickard v. Roberts*, 3 *Madd. R.* 384.)

The whole doctrine of the wife's settlement out of her personal property in equity, has recently undergone considerable discussion and criticism in the English courts, and, although generally recog-

nized, it is regarded as an "innovation on the common law rights of the husband, which has been introduced by a process of judicial legislation, carried through many years, and that in its application it involves many curious anomalies." (*Wallace v. Auldejo*, 9 *Jur. [N. S.] R.* 687.)

Upon this subject it was said in the late court of errors of the State of New York: "It is not disputed that a husband, in virtue of his marriage, becomes absolute owner of the goods and chattels of his wife; and may, consequently, dispose of them, including not only her chosés in possession, but in action, when the latter are reduced into possession. And the authorities go so far as to say, that if the husband can obtain possession of the wife's chosés in action, without the aid of a court of chancery, he will be permitted to do so, and then to dispose of them at his discretion. But when the property of the wife is under the care of the court, and the husband cannot enjoy it without the authority of the court, care will be taken that before it is placed at the husband's disposal a suitable provision shall be made out of it for the wife's support. That the general assignees of the husband stand in no better situation than the husband himself, admits of no dispute."

The result of the case established the following propositions:

1. That the wife has an undoubted right to an adequate provision for her and her children, if any, out of her equitable property, as against her husband or any assignee of the husband. And when it is necessary to come into a court of equity for its aid in obtaining possession of such property, the court will see that proper provision is made.

2. That though, in general, a husband who lives with and maintains his wife is entitled to receive the dividends or interest of her estate, yet when the husband deserts his wife, or neglects or refuses to provide for and maintain her, or where he has misbehaved himself, or shown a total incapacity to manage his concerns, or a disposition wantonly to waste his wife's property, in such cases the court ought to direct the interest to be paid either to the wife or to a trustee for her benefit. (*Udall v. Kenney*, 3 *Cow. R.* 590, 599, 609.)

In regard to this authority it has been well said, that it "presents a striking instance of the healthful influence of a court of chancery, in guarding the rights of the helpless and unprotected, and it is hoped this question is finally put at rest." (*Reeve's Dom.*

Rel. 1862, p. 70, note 1. *Vide also Hanson v. Keating*, 4 *Hare's*, R. 1.)

It has been held, however, that this rule in equity will not obtain when the wife lives apart from her husband without cause, or if she has a sufficient provision from any source. (*Fry v. Fry*, 7 *Paige's Ch. R.* 462. *Martin v. Martin*, 1 *Hoff. Ch. R.* 462.)

The wife's equity may be extended to the whole of the real and personal estate descended or devised to the wife; and it extends to a debt due to her before marriage, which the husband has not reduced to possession. (*Haviland v. Bloom*, 6 *Jones' Ch. R.* 178. *Smith v. Kane*, 2 *Paige's Ch. R.* 303.) When the wife was entitled to an equitable provision out of property devised to her, her husband being a lunatic, of whose person and estate no committee had been appointed, the court decreed her right in the property, and ordered it to be assigned to the assistant register, and the income thereof to be paid to her until further order. (*Carter v. Carter*, 1 *Paige's Ch. R.* 463.)

§ 259. Whether a court of equity will restrain the husband or his assignee from proceeding at law to possess himself of the wife's property in action, or compel by order a suitable provision out of the same for her support on her application, has been considered a doubtful question with the equity on the side of the wife.

Upon this subject the late Chancellor Kent said: "Whether the suit for the wife's debt, legacy or portion, be by the husband or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a portion of the property. The provision is to be proportioned, not merely to that part of the equitable portion of the wife's estate which the husband seeks, but to the whole of her personal fortune, including what the husband had previously received. And perhaps chancery ought on just principles to restrain the husband from availing himself of any means, *either at law or equity*, of possessing himself of the wife's personal property in action, unless he would make a competent provision for her. The English rule in equity is, that when there is a suit in the ecclesiastical courts for subtraction of a legacy, and there is a married woman to be protected, or a trust to be executed, the court of chancery will restrain the suit by injunction." (2 *Kent's Com.* 139.)

And upon the same subject, the late Judge Story said: "This was formerly matter of no inconsiderable doubt, as it was not

unnaturally supposed that the jurisdiction rested solely upon the ground, that parties seeking relief in equity should do equity ; and if they were not seeking any relief, then that the court remained passive. But the doctrine is now firmly established that whenever the wife is entitled to this equity for a settlement out of her equitable interest against her husband or his assignees, she may assert it in a suit as plaintiff, by bringing a bill in the name of her next friend. And certainly there is much good sense in disallowing any distinction founded upon the mere consideration who is plaintiff on the record ; for an equity is precisely the same whether she is plaintiff or whether she is defendant. If it is a substantial right, it ought to be enforced in her favor, whenever it is withheld from her." (2 *Story's Eq. Jur.* § 1414.)

There are very respectable authorities against the position that a court of equity will restrain the husband from proceeding at law in those cases until he makes a suitable provision for his wife ; but they have not as good reason as the opposite doctrine, and the latter seems to be a prominent feature in all the late equity decisions involving the question, and the rule in favor of the wife may be regarded as settled. The common law right of the husband to the wife's personal property during coverture is annulled or greatly modified in many of the states, which will be fully noticed hereafter.

CHAPTER XXII.

THE HUSBAND'S INTEREST IN HIS WIFE'S REAL ESTATE AT COMMON LAW—HIS TENANCY BY THE CURTESY AND THE INCIDENTS RESPECTING IT—HOW CURTESY MAY BE DEFEATED AND BARRED.

§ 260. At common law, the husband acquires by the marriage the usufruct of all the freehold estate of the wife, consisting of all her lands, tenements and hereditaments which she has in fee simple, fee tail, or for life. This doctrine is so ancient, and so well understood, that the numerous authorities on the subject need not be referred to.

The interest of the husband in the land estate of his wife is of a *freehold* character, because it *may* continue during his natural life, and has no certain determinate period. He is said to be

seised *jure uxoris*; and during their joint lives he takes the rents, issues and profits that accrue during coverture absolutely, and if unreduced to possession during his life, they pass to his personal representatives, and an action to recover them does not survive to the wife. (*Clapp v. Stoughton*, 10 *Pick. R.* 463. *Shaw v. Partridge*, 17 *Vt. R.* 626. *Edrington v. Harper*, 3 *J. J. Marsh. R.* 360. *Bailey v. Duncan*, 4 *Mon. R.* 260.) Or, in the language of one of the cases, "a husband's interest in the lands of his wife, held in her own right, is denominated a freehold, because of its certain continuance during coverture, and during his life, after her decease, provided he is tenant by the curtesy. As a necessary incident, the husband becomes entitled to the possession, and to the rents and profits, commensurate with his estate, and, if vested, may recover the same in his own name. These marital rights were well settled by the common law," and the husband cannot be deprived of them, except by an unmistakable provision of statute; and, even then, an estate acquired prior to the enactment of the statute would not be affected by its provisions. (*Smith v. Colvin*, 17 *Barb. R.* 157, 160.)

If husband and wife convey the real estate of the wife to trustees for the use of the grantors, the husband will have the absolute control of the proceeds of the sale. (*Siter v. McClanachan*, 2 *Gratt. [Va.] R.* 280.)

If a lease for a term of years is executed to husband and wife jointly, the husband takes the rents and profits during the joint lives of the husband and wife; and the husband may alien the entire term or estate, so as to bind the wife and deprive her of her rights of survivorship. (*Jackson v. McConnell*, 19 *Wend. R.* 175. *Dian v. Glover*, 1 *Hoff. Ch. R.* 71. *Goelet v. Gori*, 31 *Barb. R.* 314.)

During the joint lives of the husband and wife, he has the absolute control of the estate of the wife, and may convey or mortgage it for that period. (*Barber v. Harris*, 15 *Wend. R.* 615, 617. *Railroad Co. v. Harris*, 9 *Ind. R.* 184.)

The interest of the husband in his wife's lands may be taken and sold on execution against the husband. (*Mattocks v. Stearns*, 9 *Vt. R.* 326. *Perkins v. Cottrell*, 15 *Barb. R.* 446, 448. *Cauley v. Porter*, 12 *Ohio R.* 79. *Williams v. Morgan*, 1 *Litt. R.* 168. *Brown v. Gale*, 5 *N. H. R.* 416. *Bobb v. Paley*, 1 *Greenl. R.* 6. *But vide Jackson v. Suffern*, 19 *Wend. R.* 175.) The purchaser, on

the execution sale, will take the rents and profits for a definite period, or the whole life estate, at an appraisal of the value founded on a proper estimate of the probability of human life, or just the interest which the husband had in the lands during coverture. (*Litchfield v. Cadworth*, 15 *Pick. R.* 23.) If the husband has released his interest in his wife's lands to his wife, reserving an annuity to himself, it is held, in Pennsylvania, that his creditors have no longer any lien on the lands. (*Bonslaugh v. Bonslaugh*, 17 *Serg. & Rawle's R.* 361.) Of course, the husband's conveyance by mortgage will only pass his life estate, or the joint life estate of himself and wife, as the case may be, and no more. (*Miller v. Shackelford*, 3 *Dana's R.* 291.)

§ 261. Upon this subject Mr. Clancy says: "The husband gains an estate of freehold in the inheritance of his wife, in her right during her life. He is not, however, solely seised, but jointly with her. The interest which the husband acquires by marriage, in the estate of inheritance of his wife, is most correctly expressed in the technical phraseology of the common law pleaders, viz., 'That husband and wife are jointly seised in right of the wife.'" Again: "But, although the husband is said to be jointly seised with his wife, and not solely in her right, it is not to be inferred that he is incapable of creating an estate of freehold in her inheritance, without her being a party to the conveyance. For instance, he may alone, during the coverture, create, by deed, an estate of freehold, and thereby make a good tenant to the *præcipe* without the wife's joining him in a fine. So, at the common law, a husband seised in right of his wife might have made a discontinuance of the wife's estate, and thus barred her right of entry, which proves that he had the power of conveying the freehold, without her consent, during his life; for a discontinuance can be worked only by a person having a lawful estate, to which he can give an unimpeachable title during his life, and he must, consequently, have had a *sole* seisin in the freehold for his life." (*Clancy on Husband and Wife*, 161, 162.)

§ 262. Bacon, in his Abridgment, says: "From the time of the intermarriage the law looks upon the husband and wife but as one person, and, therefore, allows of but one will between them, which is placed in the husband, as the fittest and ablest to provide for and govern the family; and, for this reason, the law gives the husband an absolute power of disposing of her personal property, no acts of

hers being of any force to affect or transfer that which, by the intermarriage, she has resigned to the husband; but the freehold and inheritance of the wife is subject to other rules and regulations, for the husband, by marriage, does not become absolute proprietor of the inheritance, but, as the governor of the family, is so far master of it as to receive the profits of it during her life, but has no power to make an absolute sale of it without her consent." (1 *Bac. Ab.* 286.)

With respect to the power of the husband to lease his wife's lands during coverture, Bacon says: "If the husband seised of lands in right of his wife, makes a lease thereof for years by indenture or deed poll, reserving rent, *all* the books agree this to be a good lease for the whole term, unless the wife, by some act after her husband's death, shows her dissent thereto; for if she accepts rent, which becomes due after his death, the lease is thereby become absolute and unavoidable." (1 *Bac. Ab.* 302.)

This position of Bacon, in regard to the effect of the acceptance of rent by the wife, is not fully sustained by the authorities. The lease of the husband of his wife's lands for years, is not void during the joint lives of himself and wife; but if either dies within the term, the lease becomes void, except that a tenancy by the curtesy may change the rule. The lease in any event becomes absolutely void, and is determined by the death of the husband. (*Walton v. Hill*, 2 *Saund. R.* 180, note b.)

§ 263. A lease of the wife's land by husband and wife, at common law, is no better than that of the husband alone. The husband is always bound by a lease executed by him of his wife's lands, but the wife, whether she have joined in it or not, is not bound by it; for, having been a married woman at the time of the execution of it, she was incapable of contracting, and is therefore at liberty, when the disability is removed, to avoid or affirm this contract, if it be capable of confirmation; and the same power of affirming or avoiding such a lease descends upon the issue of the wife. (*Jeffery v. Grey*, *Yelv. R.* 78.)

But not only may such a lease of the wife's land be avoided by the wife and her issue on the death of her husband, but the same power may be exercised by a subsequent husband of the wife, or any other party claiming under the wife by any legal proceeding; or the lease may be confirmed by the wife or the other parties named. (*Vide Clancy on Husband and Wife*, 174.)

The husband alone may charge the wife's land during the joint lives of husband and wife. He has the power at common law, to transfer the *whole* estate of his wife, and the estate will lie in the alienee of the husband, subject to the right of *entry* of the wife, or her heirs, and which entry is necessary to revest the estate after the husband discontinues it. (2 *Kent's Com.* 133. *Butterfield v. Beall*, 3 *Ind. R.* 203.)

The interest in the wife's lands, and power over them by the husband, ceases in all cases of absolute divorce, that is upon the dissolution of the marriage by a divorce *a vinculo matrimonii*. (*Stearns v. Stearns*, 10 *Ohio R.* 540. *Mattock v. Stearns*, 9 *Vt. R.* 326. *Burt v. Hurbut*, 16 *ib.* 292. *Oldham v. Henderson*, 5 *Dana's R.* 256.) A divorce from the bond of matrimony entitles the wife, at common law, of its own force, and without any order of the court, to be put immediately into the possession of her real estate. Said Chancellor Walworth: "If the husband has been guilty of adultery, he has forfeited his right to the rents and profits of his wife's estate, by this violation of the marriage contract. And if the wife succeeds in obtaining a decree for a divorce, she will be entitled, as a matter of course, to her real estate, and to the rents and profits thereof from the time of filing her bill, so far as the husband has not actually reduced the same to his possession." (*Vincent v. Parker*, 7 *Paige's Ch. R.* 65, 66.)

In many of the states, the husband's usufruct of the wife's freehold during coverture is abolished or modified, which will be noticed hereafter.

§ 264. If the husband dies in the life-time of the wife, the fee of her lands remains in her, and the heirs and personal representatives of the husband have no interest in the same, except that crops growing upon the land at the time of his death belong to his estate. Although the emblements growing upon the land adhere to the freehold, they are regarded in this case as personal property, and vest in the executors or administrators of the husband, and they have a right to enter upon the land for the purpose of gathering such emblements. So, when a husband is seised of land in right of his wife, and she dies without issue by him born alive, the land descends to the heir of the wife, and the interest of the husband in the land is at once terminated, except that if the husband has sown or planted the land he is entitled to the emblements. (*Reeves' Dom. Rel.* 28, and authorities there cited.) So, also, when

the husband and wife divorced *causa præcontractus*, and the husband has sown the land of his wife previous to such divorce, he will be entitled to the emblements; for, although the divorce is the act of the parties, yet the sentence which dissolves the marriage is the judgment of the law, *et judicium redditur in invitum*. (*Osland's case*, 5 *Coke's R.* 116 a. *Vide also Mattock v. Stearns*, 9 *Vt. R.* 326.) It is also held that, at common law, the lease by a husband of lands which he holds in the right of the wife, will operate so far in the tenant's favor as to entitle him to the emblements. (*Mooney's case*, 2 *Vern. R.* 322. *Gould v. Webster*, 1 *Tyler's [Vt.] R.* 409.)

§ 265. There remains to consider another very important interest which the husband may have in his wife's landed estate, known as his tenancy by the curtesy, which does not terminate with the death of the wife, but is extended beyond that period.

The term curtesy was probably derived from the husband's attendance at the lord's court, or *curtis*, in respect of the wife's real property. Tenant by the *curtesy* of England, perhaps originally signified nothing more than tenants by the *courts* of England, for, in Latin, he is called *tenens per legem Angliæ*. (*Vide 2 Bl. Com.* 126, and note 8.)

According to Blackstone, as soon as any child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis*, did homage to the law, and was called tenant by the curtesy *initiate*; and, this estate, being once vested in him by the birth of the child, was not suffered to deteriorate by the subsequent death, or coming of age, of the infant. (2 *Bl. Com.* 127.)

The husband's estate by the curtesy is defined by Sir Thomas Littleton, in his famous treatise on "Tenures," to be an interest for life in the lands and tenements belonging to his wife, of which she was seised, in fee simple or fee tail, upon her having issue, by her born alive, that may, by possibility, inherit the estate by descent from her. (*Litt. on Ten.* §§ 35, 52. 1 *Bright's Husband and Wife*, 116.)

This was the definition of the husband's estate by the curtesy, as given by the great English jurist four hundred years ago, and the same rule is universally recognized at the present day.

§ 266. This estate by the curtesy has been supposed to have its origin within the realm of England, but it appears to have

obtained in the ancient province of Normandy, and was, likewise, used among the ancient Almaines or Germans. (*Vide 2 Bl. Com.* 126.)

There are four preliminary events requisite to the completion of this title by the curtesy: first, marriage; second, seisin; third, issue; fourth, death of the wife. The marriage must be canonical and legal, or one that is valid by the local laws of the state. However, if the marriage be voidable only, it will give curtesy, unless it is actually avoided during the life of the wife. It cannot be declared void after the death of the wife so as to affect curtesy. (1 *Washburn on Real Property*, 129, 130.)

The seisin of the wife must be an actual seisin or possession of the lands, not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. Courts of equity, however, allow curtesy of *trust*, and of other interests, which, although mere *rights in law*, are deemed estates in equity. Entry is not always necessary to an actual seisin or seisin in deed, for, if the land be in lease for *years*, curtesy may be without entry or receipt of rent, the possession of the lessee being the possession of the husband and wife. But if the lands were not let, and the wife died before entry, there could be no curtesy. A man will not be entitled to tenancy by the curtesy of a reversion or remainder *expectant upon an estate of freehold*, but upon a reversion, expectant upon an estate, for years, this right accrues, for the possession of the tenant for years constitutes a legal seisin of the freehold in reversion. (*Vide 2 Bl. Com.* 127. *Watts v. Ball*, 1 *P. Wms. R.* 108. *Casborne v. Scarfe*, 1 *Atk. R.* 603. *DeGray v. Richardson*, 3 *ib.* 469, 470. *Goodtitle v. Newman*, 3 *Wils. R.* 521. *Stoughton v. Leigh*, 1 *Taunt. R.* 410.)

With regard to the third event, viz., issue, it is an ingredient essential to the completion of this title that the issue be born alive, of which its crying is said not to be an essential proof, for, as Lord Coke observes, "Peradventure it may be born dumb." (*Coke's Litt.* 15 *a.*) The issue must also be of the human species; for if the wife be delivered of a monster, this is no issue in law. (*Pain's case*, 8 *Coke's R.* 34.) But if the issue be born deaf and dumb, or be an idiot, such issue is lawful to make the husband tenant by the curtesy. (*Ib.*)

The issue must be born in the life-time of its mother. If the mother die before the offspring comes into life, the husband cannot

be tenant by the curtesy, for the title must commence with the birth of the issue, and be perfected by the death of the wife. But if the wife die before the birth of the child, then the child could not be said to have been born during the marriage, nor in the life-time of the wife, and therefore the husband could not allege in pleading, as he ought, that he had issue during the marriage. (*Pain's case*, 8 *Coke's R.* 34.)

The issue, to make the husband tenant by the curtesy, must also be such as is capable of inheriting the wife's estate; for if the lands be given to a woman and the heirs male of her body, she takes a husband and has issue a daughter only and dies, he will not be tenant by the curtesy, because the daughter by no probability could inherit the mother's estate in the land. (*Pain's case*, 8 *Coke's R.* 34.)

It is, however, immaterial at what period of the coverture the issue capable of inheriting was born, whether it be before or after the descent of the lands upon the mother, or whether at the time of such descent the issue be living or dead. As, if a man seised of lands in fee has issue a daughter, who takes a husband and has issue, the father dies, the husband enters, he will be tenant by the curtesy, notwithstanding the issue was had before the wife was seised, and even if the issue should die in the life-time of the wife's father, before any descent of the land, still the husband would be tenant by the curtesy. (*Pain's case*, 8 *Coke's R.* 34. *And vide Clancy's Husband and Wife*, 183, 184.)

If the wife become seised of lands during the coverture, and then be disseised, and then have issue, the husband will be tenant by the curtesy of those lands, and on his wife's death may enter as such; and during her life he is called tenant by the curtesy initiate; and the same is the rule if the wife become seised after issue, though the issue die before her seisin. (*Jackson v. Johnson*, 5 *Cow. R.* 74.)

§ 267. With respect to the nature of the estate by the curtesy, Lord Mansfield, in a case decided in 1785, said: "Tenancy by the curtesy existed before the statute *de donis*; and the definition of it is, that the wife must be seised of an estate of inheritance, which by possibility her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional or absolute; and curtesy applied to both equally. I cannot agree with the argument, that on performance of the condition by birth

of a child the estate became absolute; it was so by a subtilty in odium of perpetuity, and for the special purpose of alienation, but for no other. It otherwise reverted to the donor on failure of the issue according to the original restriction. At common law the only modification of estates was by condition. The statute of uses introduced a greater latitude of qualification, but there arose a great dread of letting in perpetuities by means of the extensive operation of that statute, and, in the time of Elizabeth and James, many cases were decided with a view to prevent that effect; with this view it was allowed to her contingent remainders before the person who was to take came into *esse*; others were held to be too remote in their creation. The cases proceeded in that view too far, and estates were too much loosened and it became necessary to restrain them again; and in the time of troubles, eminent lawyers, who were then eminent chamber counsel, devised methods which on their return to Westminster Hall they put in practice, such as interposing trustees to preserve contingent remainders. It is not of long date that the rules now in use have been established. I remember the introduction of the rule which prescribes the time in which executory devises must take effect to be a life or lives in being, and twenty-one years afterward. It is contended that this is a conditional limitation. It is not so, but a contingent limitation; all the cases cited go upon the distinction of their being conditions and not limitations. During the life of the wife she continued seised of a fee simple to which her issue might by possibility inherit." The judgment was that the husband of the deceased *cestui que trust*, was entitled to be tenant by the curtesy. (*Buckworth v. Thirkell*, 3 Bos. & Pul. R. 652, note a.)

§ 268. In this case of *Buckworth v. Thirkell*, the subject of curtesy in estates determinable under conditional limitations or by executory devise, underwent a very full and elaborate discussion, and the case is regarded as a leading one upon the questions involved; and it has been well said that, "few cases in modern practice have provoked so much discussion, or been the subject of so much animadversion." (1 *Scribner on Dower*, 292). Lord Alvanley, in 1804, remarked that, "it occasioned some noise in the profession at the time it was decided." (*Doe v. Hutton*, 3 Bos. & Pul. R. 653.) The facts of the case were these: An estate was devised to trustees in trust for Mary Barrs, till she attained twenty-one, or married, and then to the use of her and her heirs, with a

devise over in case she died under the age of twenty-one, and without leaving issue. The events were, that she married, and had a child; the child died, and then the mother died under twenty-one; and the question was, whether the husband was entitled to be tenant under the curtesy, which entirely depended upon whether she had such an estate as, by possibility, her issue might inherit. The case was twice argued, and the court held that the husband was entitled to be tenant by the curtesy, and therefore deciding that the determination of an estate by operation of an executory devise does not defeat the right of the husband to be tenant by the curtesy.

§ 269. Mr. Butler, the learned annotator of Coke on Littleton, most decidedly disapproves of the doctrine of Lord Mansfield as laid down in *Buckworth v. Thirkell*, saying: "As to estates in fee simple, conditional at common law, and estates tail under the statute *de donis*, the wife was entitled to her dower, and the husband to his curtesy out of them, after the failure of the issues in tail. But, it may be observed, that though it is now difficult to avoid considering estates in fee simple conditional, in any other light than as estates originally granted to the donee, and to the heirs general, or to some particular heirs of his body; and the estate of the donor, as that of a reversion expectant on the failure of those heirs; yet this restriction to particular heirs, and exclusion of others, is understood to be produced, not by any limitation of persons introduced into the grant, but by a condition supposed to be annexed to it, that if there were no such heirs, or, being such, if they afterward failed, and the donee did not alien the estate, it should be lawful for the donor and his heirs to enter. This entry, therefore, was not an entry upon the *natural expiration of a previous estate*, but for a condition broken; in which case, as in all others where entry is made for breach of a condition, the right of the wife to her dower, and the husband to his curtesy, if the general rule were adhered to, would be defeated."

In his notice of the case of *Buckworth v. Thirkell*, Mr. Butler, says: "By a manuscript report of the case, the ground upon which the court appear to have formed their opinion on it, is an analogy they supposed it to bear to the cases of estates in fee simple conditional, and estates tail; in both of which dower and curtesy continue after failure of the issues; and in both of which the wife being seised of a fee, to which the issue might, by possi-

bility, inherit, entitles the husband to curtesy. Some observations have been offered above, to show that the continuation of dower and curtesy in the cases of estates in fee simple conditional was an exception to a general rule (dower and curtesy, in all other cases of conditions being defeated by the entry for the condition broken), and that the same reasoning may be applied to the continuation of dower and curtesy out of an estate tail, after the failure of issue. It may therefore seem singular that the court, on this occasion, should prefer reasoning by way of analogy from the only admitted *exception* to the rule, to reasoning by analogy from the general rule itself. It is the more singular, as the general case of estates on condition approached nearer to the case than under the consideration of the court than the particular case of estates in fee simple conditional, or estates tail; for the distinguishing feature of the devise which gave rise to the case before the court (as of all devises of that description) is, that, after the whole fee is first devised, it is made defeasible by a subsequent clause. Now, neither an estate in fee simple conditional, nor an estate tail, has any such defeasible quality or incident annexed to it, but this quality forms the very essence of all other estates upon condition, with respect to the application of the maxim that when the issue may, by possibility, inherit, the husband shall have his curtesy, and so *vice versa* of dower; in every place in the books where that is mentioned, it is to introduce an inquiry whether the wife, being in the actual seisin of an estate, was in fact seised of an estate, the *quality* of which was such, that the issue of the husband might inherit it, but never with a view to show that the *quantity* of the estate was such that it might endure so long as to be inheritable by the issue. On the contrary, when the wife's estate is evicted by title paramount, or by an entry for the breach of a condition, in both cases the issue might have inherited; but the husband would be entitled to his curtesy in neither, after the eviction or entry. Another difference between the case of an estate in fee simple made defeasible by a subsequent executory limitation or devise, and that of an estate in fee simple conditional, or an estate tail, is, that an estate in fee simple, made defeasible by an executory limitation or devise, cannot, by any means whatever, be discharged by the first taker or devisee, from the operation of the subsequent limitation or devise, but an estate in fee simple conditional may, immediately after the birth of a child, and an estate tail immediately after marriage, be

destroyed, and a fee simple absolute acquired, by the husband and wife joining in a fine or common recovery. The case is the same with respect to the wife's right of dower. Besides, the quality we are speaking of is not sufficient of itself to entitle the husband to curtesy or the wife to dower; it is only one of many incidents which the estate ought to have to give that title." (*Butler on Co. Litt.* 241 *a*, note.)

§ 270. Mr. Park, another writer of distinguished ability, also dissents from the views of Lord Mansfield on this subject, and in referring to his opinion in *Buckworth v. Thirkell*, observes: "The latter passage, in which he is made to assign a reason for his decision, that it was not a conditional limitation, is not easily reconcilable with the case stated. The original limitation to Mary Barrs was expressly a limitation of the fee, and the subsequent estates being limited in derogation of that fee, and not upon the determination of a prior particular estate, was necessarily a conditional limitation. If it was not so, it is difficult to conjecture what Lord Mansfield understood by a conditional limitation. It might, perhaps, be thought that his lordship's observations, as above stated, merely intended to take the distinction between a limitation and a condition, properly so called. But the language as stated in the report of the case in *Collectanea Juridica* is still more irreconcilable with any correct view of the law, in application to the facts stated. It is as follows: 'Now it is contended that this is a conditional limitation. It is no such thing. There is no condition in it. It is a contingent limitation. If it is a limitation it does not defeat the right of the husband to be tenant by the curtesy, though the estate is spent.' It is certainly inconsistent with all ideas entertained in modern practice, to consider an estate originally limited in fee and abridged by a subsequent limitation even upon the happening of a particular event, in any such light as that implied by the observation that it was *spent* upon the happening of that event. Indeed were not the observations of Lord Mansfield found in a case, which, as reported, was indisputably that of a conditional limitation, they would, without doubt, have been considered as establishing the general distinction, as to dower and curtesy, between estates expiring by their natural and regular limitation, and estates abridged or defeated by some collateral term annexed to this creation. So far as the language of the judgment is to be relied on, it would seem to proceed upon the very distinction which

Buckworth v. Thirkell is daily cited to overturn." (*Park on Dower*, 177, 179.)

§ 271. Some other leading English text writers agree in opinion with Messrs. Butler and Park upon the subject, while several distinguished English writers upon the law of real property, as decidedly support the doctrine of Lord Mansfield.

Mr. Jarman, in his excellent treatise on wills, which is recognized as undoubted authority, both in England and in this country, remarks: "It is to be observed, too, that an immediate estate in fee, defeasible on the taking effect of an executory limitation, has all the incidents of an actual estate in fee simple in possession, such as curtesy, dower, etc.; the devisee having the inheritance in fee, subject only to a possibility." (1 *Jarman on Wills*, 792.) Messrs. Roper and Bisset are also among the other eminent writers who unhesitatingly indorse the rule laid down in *Buckworth v. Thirkell*. (1 *Roper on Husband and Wife*, 38-43, 377. *Bisset on Life Estates*, 82-87.)

§ 272. The English courts have also generally acquiesced in, or expressly approved of, the doctrine of *Buckworth v. Thirkell*. Thus, in a case decided in the English common pleas, in 1825, Best, Ch. J., said: "Lord *Alvanley* does not seem to approve the decision of Lord Mansfield, in *Buckworth v. Thirkell*; and according to his lordship's account of it, the case *made a noise in Westminster Hall* at the time the judgment was given. The great respect I feel for Lord *Alvanley* and the bar, is such as to make me pause before I make up my mind as to the certificate that should be sent to the vice-chancellor. I must, however, be permitted to say, that after a decision of the court of king's bench, which was much considered before it was pronounced, has remained unimpeached for more than forty years, and has been confirmed by the case of *Goodenough v. Goodenough*, we ought not to overturn it unless it establishes a rule productive of injustice and inconvenience. Whatever conveyancers might have thought of the case when it was first decided, they have since considered it as having settled the law, and it would be productive of much confusion to unsettle it again." (*Moody v. King*, 9 *Eng. C. L. R.* 475, 476.) And the case of *Buckworth v. Thirkell*, was the authority chiefly relied upon for the judgment which was ordered by the court.

§ 273. Other English authorities might be cited in which the doctrine that the determination of an estate by operation of an

executory devise does not defeat the right of the husband to be tenant by the curtesy, in accordance with the views of Lord Mansfield in *Buckworth v. Thirkell*, which has been considered a leading authority upon the subject ever since it was delivered. So late as 1856 the rule was recognized in the English chancery, and the principle applied to an *equitable* determinable estate. The case was first decided by the vice-chancellor, and upon appeal to the lord chancellor the decree of the vice-chancellor was affirmed. (*Smith v. Spencer*, 2 *Jurist* [N. S.] 778. 6 *De Gew, Macnaghten & Gordon's R.* 631.)

The opposition to this doctrine is generally based upon a decision in the English court of chancery as early as the forepart of the eighteenth century, when the Earl of Macclesfield was lord chancellor of England, wherein it was held that, "whenever the estate is to be determined by express limitation or condition upon the death of the wife, then the husband shall not have curtesy." (*Boothby v. Vernon*, 9 *Mad. R.* 150. *Vide also Sammes v. Payne*, 1 *Leon. R.* 168, and *Sumner v. Partridge*, 2 *Atk. R.* 47.)

§ 274. With respect to the case of *Buckworth v. Thirkell*, Mr. Bright says: "It may be doubted whether the court intended to decide generally that curtesy should exist notwithstanding the determination of the estate by executory devise, or whether it turned upon the particular nature of the limitation. The wife was seised in fee, subject to an executory devise over, in the event, which happened, of her dying under age, and without having issue. Hence, if she had left children, they would have been entitled by descent; and the judgment of Lord Mansfield proceeded chiefly, if not entirely, upon the ground that the case for this reason came within the definition of curtesy, that the wife had an estate of inheritance, which any issue she might have had by the husband would have inherited, and that that estate continued during her life. The decision of the court of common pleas, in *Moody v. King*, seems to have been founded on similar reasons; and the case of *Goodenough v. Goodenough* (if it involved this question) is open to the same distinction. These cases, therefore, supposing their authority to be admitted, cannot be considered as deciding any thing, except when the death of the husband or wife, without leaving issue, is the event upon which the estate is determinable; still less do they apply to cases where the limitation depends upon an event which happens during coverture. To

sustain the argument in favor of dower and curtesy in such cases, it would be necessary to contend that after the estate of the husband or wife had ceased, and the party entitled under the limitation over had entered, the former estate should partially revive upon the determination of the coverture. The doubt in the case of *Flavill v. Ventrice* did not go to this extent, the event not having happened till after the husband's death; and though, according to one of the reports of *Sammes v. Payne*, this point was put by one of the judges, yet the absence of the passage from the other reports of the case, and the other discrepancies between them which Mr. Park has pointed out, show that very little reliance can be placed on the authenticity of this dictum.

It may be concluded that there is no authority for the continuance of dower or curtesy after the determination of the estate by conditional limitation or executory devise, except when it determines by the death of the husband or wife without leaving issue, and that it is still extremely questionable whether the exception can be supported." (2 *Bright's Husband and Wife*, 472.) It is proper to remark that, since Mr. Bright came out with his very able work on the law of husband and wife, several authorities of considerable weight have been reported confirming the doctrine he impliedly condemns. It may also be suggested that while his argument is plausible, his reasoning does not necessarily dispose of the cases reviewed.

§ 275. The question whether the right to curtesy or dower continues after the estate of the wife in the one case, or of the husband in the other, has determined by limitation, or by executory devise, has also been much discussed in the United States, and the result is that an entirely unanimous opinion has not been reached.

Chancellor Kent says that curtesy applies to qualified as well as to absolute estates in fee, but the distinctions on this point, he adds, are quite abstruse and subtle. He then speaks approvingly of the doctrine of Paine's case (8 *Coke's R.* 34), and remarks: "So when an estate was devised to a woman in fee, with a devise over, in case she died under the age of twenty-one, without issue, and she married, had issue, which died, and then she died, under age, by which the devise over took effect; still, it was held the husband was entitled to his curtesy." (4 *Kent's Com.* 32.) Of course it will be discovered that the chancellor refers to the case of *Buckworth v. Thirkell*, as authority for this last proposition; though in another

place he avers that "the ablest writers on property law, are evidently against the authority of the case of *Buckworth v. Thirkell*," leaving it to be *inferred* that he, himself, is opposed to the doctrine of the case. (4 *Kent's Com.* 50.)

Mr. Hilliard, another standard author upon real property, says: "Devise to a woman in fee, with a devise over, if she die under age, without issue. The woman marries, has issue which dies, and dies herself under age. This is a contingent limitation, not a conditional limitation, and the husband shall have curtesy." (1 *Hilliard on Real Prop.* 114, § 23.) It will be here observed, that the learned writer recognizes the authority of *Buckworth v. Thirkell*, but adopts a distinction which militates against the doctrine of the case. But again the writer says: "With regard to curtesy, as well as dower, if the primitive estate terminates by force of a *condition* instead of a limitation, the derivative interest is also defeated." (*Ib.* § 24.) Mr. Washburn, late one of the judges of the supreme judicial court of Massachusetts, and a writer of great eminence in this country, admits that questions of great subtlety and difficulty have arisen in respect to determining estates, whether, upon their determining, the husband's right of curtesy is defeated or not; but lays down the rule, that if a *feme-covert* is seised of a fee simple, and there is an executory devise over, and the estate is defeated by the happening of the event on which the executory devise depends, the husband would nevertheless be entitled to curtesy in the same." (2 *Washb. on Real Prop.* 374.) "So," he says also, "when the devise was to a daughter and her heirs, and if she died without issue, the whole estate was to be sold, and the proceeds paid to her brothers and sisters, and she married and had a child, which died, and then she died without issue, her husband had curtesy." (1 *Washb. on Real Prop.* 131, referring to *Buchanan v. Sheffer*, 2 *Yeates* [Penn.] R. 374. *Hay v. Moyer*, 8 *Watt's* [Penn.] R. 202. *Taliaferro v. Burwell*, 4 *Call's* [Va.] R. 321.) It will be seen that this is the same principle which is laid down in *Buckworth v. Thirkell*, which Mr. Washburn evidently approves.

§ 276. It may be averred also, that the American cases are rather in harmony with this doctrine, although they are by no means uniform upon the subject.

In a case in the supreme court of Pennsylvania, decided as late as 1860, it was held that curtesy attaches to an estate in fee, subject

to a conditional limitation, though the grantor intended otherwise; and in giving the opinion of the court, Lowry, Ch. J., said: "The case of *Buchanan v. Sheffer* (2 *Yeates*, 374) decides this on the authority of *Buckworth v. Thinkell*, though possibly the case might have been decided in the same way on other grounds. The principle of this latter case has been very ably attacked and defended in the arguments here, and we shall not repeat the discussion. In favor of the principle we have Kent (4 *Com.* 472, 8th ed.) Roper (1 *Husband and Wife*, 38-43), and Preston (3 *Abst. of Title*, 372-384). And against it we have Butler (note 170 to *Coke on Litt.* 241 a) and Park (*Dower*, 167-191). Roper on one side, and Park on the other, go very fully into the discussion of the authorities and the principle. Its supporters go on the substance of the principal estate, and its assailants on the form of its creation; and, owing to the innumerable variety of the forms of expression in which the same substantial estate may be created, we think it much more certain to attack the incidents to its substance than to the form of its creation. On a subject that involves so many difficult questions, we confine ourselves carefully to the case before us, and say that curtesy attaches to an estate in fee, that is subject to a conditional limitation on the failure of issue." (*Thornton's Executors v. Knapp's Executors*, 37 *Penn. R.* 391.)

§ 277. The doctrine of the case of *Buckworth v. Thinkell* was also distinctly recognized in a much earlier case in the State of Pennsylvania, although the question was considered upon an application for dower. Chief Justice Gibson, in speaking for the court, said: "I have a deferential respect for the opinion of Mr. Butler, who was, perhaps, the best conveyancer of his day, but I cannot apprehend the reasons of his distinction in the note to *Co. Litt.* 241 a, between a fee limited to continue to a particular period at its creation, which curtesy or dower may survive, and the devise of a fee simple or a fee tail, absolute or conditional, which, by subsequent words, is made determinable upon some particular event, at the happening of which dower or curtesy will cease." Again: "How to reconcile to any system of reason, technical or natural, the existence of a derivative estate after the extinction of that from which it was derived, was for him to show, and he has not done it. The case of a tenant in tail, says Mr. Preston, 'is an exception arising from an equitable construction of the statute *de donis*; and the cases of dower of estates determined

by executory devise and springing use owe their existence to the circumstance that these limitations are not favored by common law principles.' The mounting of a fee upon a fee by executory devise is a proof of that." And again: "Before the statute of wills there was no executory devise, and before the statute of uses there were no springing uses;" and adds: "It was to the benign temper of the judges who molded the limitations of the estates introduced by them, whether original or derivative, so as to relax the severer principles of the common law, and, among other things, to preserve curtesy and dower from being barred by a determination of the original estate, which could not be prevented." (*Evans v. Evans*, 9 *Penn. R.* 190.) The law of the case as settled by the court is, that a widow is dowable of a fee simple, determinable by executory devise on her husband dying without issue living at the time of his death.

§ 278. A case similar to *Evans v. Evans* has been decided by the court of appeals of the State of Kentucky, and judgment given in accordance with the principles of *Buckworth v. Thirkell*. Judge Marshall, in his opinion, says: "As curtesy and dower are almost identical in respect to the estate out of which they may arise, the case just cited (*Buckworth v. Thirkell*) might be regarded as sufficiently in point to form a precedent for the one before us." (*Northcott v. Whipp*, 12 *B. Mon. R.* 65, 75.)

The case of *Buchanan v. Sheffer*, referred to by Washburn, was this: a man devised the whole of his estate to his daughter, "to her, her heirs and assigns forever;" but if she should die without issue, his whole estate was to be sold by his executors, and the money arising therefrom, after his widow's decease, to be equally divided among his brothers' and sisters' sons. The daughter married, and had issue that died during her life. Her husband was held entitled to her estate as tenant by the curtesy. (*Buchanan v. Sheffer*, 2 *Yeate's R.* 374.)

§ 279. On the contrary, one of the justices of the supreme court of the State of New York, sitting at special term, has expressly dissented from the views of Lord Mansfield, as expressed in *Buckworth v. Thirkell*, and refused to adopt the doctrine of that case. Brown, J., referring to what he regarded the rights of the wife in the case he was considering, said: "This conclusion conflicts with Lord Mansfield's judgment in the case of *Buckworth v. Thirkell* (3 *Bos. & Pull.* 652). It is the rule, however, given

by Mr. Cruise in his treatise on the law of real property (*tit.* 6, *Dower*, *ch.* 3, § 33), and is the rule maintained by Mr. Park, with singular ability, in his work on the law of dower, page 174, to be found in the 11th volume of the Law Library." (*Weller v. Weller*, 28 *Barb. R.* 588, 593.)

But the doctrine of *Buckworth v. Thirkell*, is more authoritatively disputed in a case at general term of the same court, decided in December, 1864. The case was this: A testatrix devised her real estate to her daughter, and if such daughter "should never have any children, or a child living at her decease," she devised the same to one Hatfield, his heirs and assigns. The daughter married and had one child, which died before its mother. The wife made her will, devising the land to her husband, and died. The court held that the daughter took nothing more than a life estate, which was turned into a fee, only by her having a child living at her death; and that, upon her death without issue living, Hatfield took an absolute estate in fee. And it was further held, that the surviving husband was not entitled to a tenancy by the curtesy in the lands.

J. F. Barnard, J., delivering the opinion of the court, said: "The wife of the defendant took nothing more than a life estate, and the plaintiff takes an absolute fee on her death. Notwithstanding this result, is the defendant entitled to a tenancy by the curtesy in the lands, and was there seisin of the wife of an estate of inheritance? It is claimed by the defendant that *Buckworth v. Thirkell* (3 *Bos. & Pul.* 652, *n*) is an authority in his favor on this point. I do not think the cases quite similar. In that case the wife had an estate, but it was only liable to be defeated in case she died before arriving at the age of twenty-one years. She died before that age, and the husband was held to be entitled to a tenancy by the curtesy. Here, from the will taken together, she takes at no time but a life estate, which is to be turned into a fee only by her having a child living at her death. This condition has never happened, and at no time has she had an estate of inheritance to be defeated by the happening of a subsequent condition, as in the case of *Buckworth v. Thirkell*. Besides, the case of *Weller v. Weller* (28 *Barb.* 589) conflicts with that case. It is there decided that when the estate of the husband is determined by the happening of an event which defeats its further continuance the estate in dower must be determined with it. This seems much more reasonable and just. The husband takes his estate of

tenancy by the curtesy through the wife, and when her right is determined his should also be determined. There is no estate from which his tenancy by the curtesy can attach." (*Hatfield v. Sneden*, 42 *Barb. R.* 615, 622.)

§ 280. It will be observed, therefore, that the question whether the right to curtesy continues after the estate of the wife has determined by limitation, or by an executory devise, is embarrassed by conflicting authorities in this country, as well as in England. It would seem, however, that the adjudged cases are more in harmony with the affirmative of the proposition than otherwise. The doctrine that the right to curtesy does continue after such determination of the wife's estate, is expressly recognized in the states of Pennsylvania, Kentucky and South Carolina; and it is probably the prevailing doctrine of the cases in other states; while the contrary doctrine is rather in accordance with the spirit of the authorities in New York, though the question does not seem to have ever undergone a very full or elaborate discussion before the courts of that state.

It may be thought that this branch of the subject of tenancy by the curtesy is so replete with perplexing refinements, and so involved in mystery and technical subtleties, as to render the consideration of it of no practical use, and that, therefore, too much space has been devoted to it in this place. But while it may be admitted that the system of estates at the common law is a complicated and an artificial one, still it may be averred that it is a system complete in all its parts, and is consistent with technical reason, and may be fully comprehended by the logical and philosophical mind.

§ 281. There are some other circumstances and principles involved in this question of tenancy by the curtesy, which remain to be examined, and more clearly brought out.

It has been stated that in the case of a tenancy by the curtesy it is well settled that the child must be born alive in the life-time of the mother, to entitle the father to the estate. If, therefore, the mother dies, and the child is afterward delivered by the cæsarean operation, it is not considered as existing before its birth, so as to entitle the husband to curtesy. (*Marsellis v. Thalhimer*, 2 *Paige's Ch. R.* 35, 42.) The reason assigned in this case, why the husband is not entitled to curtesy, viz.: that the child is not considered to be in *existence* before its birth, is hardly satisfactory, in view of the

well known rule, that a child in *ventre sa mere* is considered *in esse*, not only for its own benefit, but for other purposes. Lord Coke's statement is more consistent with other established rules in similar cases. He says that "if, by the death of the wife in childbed, it is necessary to resort to the *cæsarean* operation, the birth of such child will not entitle the husband to curtesy; because the issue was not *born* during the coverture, or the wife's life, and the land descended in the mean time, and the estate of tenant by the curtesy ought to take away the immediate descent; and in pleading, it is necessary for him to allege that he had issue during the marriage, which in this case he cannot do." (*Paine's case*, 8 *Coke's R.* 69. *Co. Litt.* 29 *b.*) It seems not to be enough that there be inheritable issue, but the child must be *born* alive in the life-time of the mother. The child may be in being in the life-time of the mother, and yet not be born during her life.

§ 282. The doctrine that the wife must have seisin in fact applies only in cases where her title is incomplete before entry, as when she takes as heir or devisee, and not when she takes by a conveyance which passes the legal title and seisin of the land. (*Adair v. Lott*, 3 *Hill's [N. Y.] R.* 182.) Where a *feme-covert* is the owner of wild and uncultivated land, she is considered in law and in fact possessed, so as to enable her husband to become a tenant by the curtesy. An actual entry, or *pedis possessio*, by the wife or husband during the coverture, is not requisite to the completion of a tenancy by the curtesy. (*Smoot v. Lecatt*, 1 *Stew. R.* 590. *Jackson v. Sellick*, 8 *Johns. R.* 262. *Jackson v. Gilchrist*, 15 *ib.* 89. *Davis v. Mason*, 1 *Peter's R.* 503, 506. *Clay v. White*, 1 *Munf. R.* 162. *Pierce v. Wannett*, 10 *Iredell's R.* 446. *Vide also Green v. Liter*, 8 *Cranch's R.* 229.)

If land is in lease for years, curtesy may be without entry, or even receipt of rents, the possession of the lessee being deemed the possession of the husband and wife. In fact, it is sufficient seisin if the wife has a tenant in possession who holds at will, or who entered under a contract to purchase her estate. (*Jackson v. Johnson*, 5 *Cow. R.* 74. *Powell v. Gossom*, 18 *B. Mon. R.* 179. *Lowry v. Steel*, 4 *Ham. R.* 170. 8 *Cranch's R.* 245.)

The seisin of one tenant in common is the seisin of the others. Accordingly, when a person, in right of his wife, became a partner with others in the ownership of a cotton factory and other mills, and in the management of the business thereof, and received a

proportionate share of the profits from the time his wife became interested in the property, until her death; it was held that this was a sufficient seisin of the wife to consummate the estate by the curtesy in the husband. (*Buckley v. Buckley*, 11 *Barb. R.* 43. *De Grey v. Richardson*, 3 *Atk. R.* 469.)

The seisin of the wife is sufficient to make the husband tenant by the curtesy, although a vendee of the wife's ancestor be in the actual possession of the land. (*Vrooman v. Shepherd*, 14 *Barb. R.* 441.)

It is sufficient to give the husband a title to curtesy, if there has been a seisin for a moment, although it is followed by an immediate disseisin. (*Parker v. Carter*, 4 *Hare's R.* 418.)

§ 283. But if the wife is not ordinarily seised in her life-time of an estate or interest in possession, there is no estate by the curtesy. (*Pond v. Bergh*, 10 *Paige's Ch. R.* 140. *Orr v. Holliday*, 9 *B. Mon. R.* 59. *Petty v. Malier*, 15 *ib.* 591.) A mere nakedise sin by the wife as trustee will not suffice to make the husband tenant by the curtesy, though she has the beneficial interest in the reversion. Therefore, when a woman held a ground rent in fee, in trust for another during his life, and she afterward married and died, and then the *cestui que trust* died, the husband was held not to be entitled to the rent, as such tenant. (*Chew v. Commissioners of Southwark*, 5 *Rawle's R.* 160.) Although the general rule of law is that there must be an entry during coverture, to enable the husband to claim by the curtesy, the rule was never inflexible. It has always yielded to circumstances, as in the case of an advowson or rent, or where an entry was prevented by force. In like manner, if a man have a title of entry into lands, but does not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he has presently, by such a claim, a possession and seisin in the land, as if he had entered in deed. And under some circumstances, living within view of the land will give the feoffee a seisin in deed as fully as if he had made an entry. (*Mercer v. Selden*, 1 *How. U. S. R.* 54.)

In the State of Connecticut, it has been held, that it is sufficient for the claim of curtesy that the wife had title to the land, though she was not actually seised. (*Bush v. Bradley*, 4 *Day's R.* 209. *Kline v. Beebe*, 6 *Conn. R.* 494.) And in some of the states it has been expressly held that *constructive* seisin is sufficient to sustain the husband's claim as tenant by the curtesy. (*Day v.*

Cochran, 24 *Miss. R.* 261. *Stephens v. Herne*, 25 *ib.* 349. *Merritt v. Herne*, 5 *Ohio St. R.* 307.)

It has been held under the statute of Massachusetts of 1845, chapter 208, that the birth of living children after the conveyance by a married woman of land held by her to her sole and separate use, will entitle her husband, after her death, to an estate by the curtesy in the land. (*Comer v. Chamberlain*, 3 *Am. Law Reg. [N. S.]* 317. *S. C.* 6 *Allen's R.* 166.)

§ 284. An estate by the curtesy cannot attach to a mere remainder; that is to say, a husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during coverture. (*Pierce v. Hakes*, 23 *Penn. R.* 231. *Hitner v. Ege*, *Id.* 305.)

To entitle a husband to an estate by the curtesy, the wife must be seised in fact and in deed. It is not sufficient that the wife has a seisin in law of an estate of inheritance. Hence, if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during coverture. There can be no seisin in fact of a vested remainder limited on a precedent freehold estate.

But when a life estate and the immediate reversion meet in the same person, the particular estate is merged in the greater estate. And if the two estates unite in a *feme-covert*, her husband is entitled to a life estate as tenant by the curtesy. (*Taylor v. Gould*, 10 *Barb. R.* 388.)

§ 285. It seems that tenancy by the curtesy is not in all cases confined to the lands themselves, possessed by the wife during coverture; but in some instances the husband has his right in the proceeds of the land, when it was sold during coverture. This, however, is never the case at common law, but depends upon the provisions of a statute, as in respect to the sale of lands belonging to an infant. Thus, when the real estate of an infant *feme-covert* was sold by order of the court of chancery, under the act authorizing the sale of infants' real estate, and the purchase-money secured to her, or for her, by bonds and mortgages, which securities were never in her possession or in that of her husband until after her death, when he obtained the same as administrator of his wife; it was held that by the sale of the land under the direction of the court there was no conversion of the real estate into personalty,

but that the proceeds were impressed with the same real uses which attached to the real estate before the sale; and that such proceeds *descended*, as the real estate would have done, to the *heirs at law* of the infant, and did not go to her personal representatives for distribution among her next of kin and others entitled thereto. It is not decided in the case under consideration what the real interest the surviving husband had in the proceeds of the sale of his infant wife's real estate; but if such proceeds descended to the heirs at law of the wife the same as the real estate would have done, the conclusion would seem to be inevitable that the husband would have his rights as tenant by the curtesy in the proceeds, provided the other requisites of a tenancy by the curtesy were in the case. (*Shumway v. Cooper*, 16 *Barb. R.* 556.) It is a well settled rule in equity that lands agreed to be turned into money, or money into lands, are considered as that species of property into which they were agreed to be converted; and "the authorities show that money agreed or directed to be laid out in land becomes land so completely as to acquire *all* the property of land." (1 *Lead. Cas. in Eq.* 598, or *541.) And perhaps, as an incident of the rule of equitable conversion, the husband would have his right by the curtesy in the proceeds of his wife's land in the case stated.

If the wife's realty be sold in partition, the court will direct one-third of the proceeds to be invested, and the interest to be paid to the husband as tenant by the curtesy initiate, or to his assigns. (*Schermerhorn v. Miller*, 2 *Cow. R.* 439.)

§ 286. As a general proposition, in order that the rules of property may be uniform, equitable estates are governed by the same rules as legal estates. An equitable estate, therefore, which if legal would have given to the husband a title to curtesy, will have the same effect in equity. (*Watts v. Ball*, 1 *P. Wms. R.* 108.) In the State of Pennsylvania, dower and curtesy are incident to both legal and equitable estates. (*Dubs v. Dubs*, 31 *Penn. R.* 149.)

The husband has been held to be entitled to curtesy of an equity of redemption. Lord Hardwicke so decided, because an equity of redemption was to be considered an estate in the land, was transmissible from ancestor to heir, might be granted, entailed, devised, or mortgaged, and might be barred by a common recovery; also, because the person entitled to equity of redemption is owner of the land, and therefore in equity seised of the estate; a seisin perfected

in the case before him by the wife's possession. (*Cashorne v. Scarfe*, 1 *Atk. R.* 603.)

In equity the rule is also, that what is agreed to be done, is considered as actually completed. In accordance with this rule, if money be vested in trustees, by will, or otherwise, in trust, to purchase lands, with a declaration of trusts which would give the wife an equitable estate tail, although the money be not converted into real property during the life of the wife, yet her husband will be entitled to curtesy. (*Cunningham v. Moody*, 1 *Ves. Sen. R.* 174. *Sweetapple v. Bindon*, 2 *Vern. R.* 536. *Dodson v. Hay*, 3 *Bro. Ch. Ca.* 404.) But if the grant or devise be to the wife for her separate use, and it manifestly appears from the conveyance or will that it was the intention of the grantor, or deviser, that her husband should not be tenant by the curtesy, this intention will govern, and the husband will not be entitled to curtesy. (*Burnet. v. Davis*, 2 *P. Wms. R.* 316.) Indeed, the husband may be excluded from the control of or any interest in his wife's property, by the conditions of the will or conveyance giving or granting him the property, or by an antenuptial agreement. (*Hardy v. Van Harlingen*, 7 *Ohio St. R.* 208.) Where, however, the intention to prevent curtesy is not clear, courts of equity so far favor the husband's right, that if, from the wife's interest, he is or would be at law entitled to curtesy, they will not disappoint his title. (*Steadman v. Pulling*, 3 *Atk. R.* 423-427.)

When the estate is limited in trust for the separate use of the wife for her life, with the equitable remainder or reversion in fee to her, the decisions differ with respect to the husband's right to be tenant by the curtesy. (*Vide Hearle v. Greenbank*, 3 *Atk. R.* 696, 716. *Rolens v. Dianwell*, 1 *ib.* 607. *Pitt v. Jackson*, 2 *Bro. C. C.* 51. *Morgan v. Morgan*, 5 *Madd. R.* 408. *Follet v. Tyrer*, 14 *Sim. R.* 125.) It has, however, been held in the State of Pennsylvania, that where a testator devised his lands in trust for his daughter, for her separate use, free from the control of any future husband, without any power to alienate or to anticipate the income, her husband surviving took his curtesy. (*Wightman's appeal*, 29 *Penn. R.* 280.)

§ 287. There are many incidents, privileges and powers belonging to the estate of tenant by the curtesy, and there are also liabilities incurred by the husband in respect of the right. Thus, a tenant by the curtesy, as other tenants for life, is entitled to the

emblems, and may dispose of them by his will, or if he makes no such disposition they will belong to his executor or administrator. So a tenant by the curtesy is entitled to the interference of a court of equity for the removal of a satisfied term of years, which would prejudice his title in a court of law, whether such term be outstanding or assigned to attend the inheritance.

An estate by curtesy is considered in many respects as a continuation of the estate of the wife, and the consequence is that the husband takes it after the wife's death, with all the incumbrances which would affect the estate in her possession if she were living. He will be obliged in equity, to keep down the interest of the charges upon the estate. It has been doubted whether a tenant by the curtesy is punishable for waste at common law, but his liability to make satisfaction for waste committed stands on the same footing as other tenants for life. During his life he may be held for damages by an action on the case, and the value of the timber or other property acquired by the waste may be recovered against him in an action of trover, or by a bill in equity for an injunction and account; and if the property taken off has been sold, an action of assumpsit will lie for the money produced by the sale. After his death, in cases of equitable waste committed by him, it has been decided that a bill in equity lies against his executors for an account; although with respect to permissive waste suffered by him, there is no remedy after his death.

A tenant by the curtesy may grant leases for the property, which will continue so long as he lives, but he cannot lawfully dispose of the estate for a longer period than during his life. In a word, whatever a mere tenant for life may do, either as to passing or changing his interest, a tenant by the curtesy may do. (*Vide 1 Bright's Husband and Wife*, 142-151, and authorities there cited.)

It is proper to remark, that upon the death of the wife, the husband is at once in as tenant by the curtesy, without having to resort to any preliminary form to consummate his title to the same. (1 *Washb. on Real Prop.* 142.)

§ 288. The interest of a tenant by the curtesy, and also of a tenant by the curtesy initiate, may be taken in execution for his debts, and it may be set off by appraisement, or the rents and profits may be levied upon at the election of the creditor. (*Roberts v. Whiting*, 16 *Mass. R.* 186. *Burd v. Dansdale*, 2 *Binn. R.* 80. *Mattock v. Stearns*, 9 *Vt. R.* 326.) But it seems that the

widow of the execution creditor is not entitled to dower in such an estate. (*Gillis v. Brown*, 5 Cow. R. 388.)

When the real estate of the wife in which the husband has a life estate as tenant by the curtesy initiate, is sold under a decree in partition, the creditors of the husband may by a creditor's bill, reach his interest in the fund produced by the sale, to the extent of his legal interest in the estate sold. (*Ellsworth v. Cook*, 8 Paige's Ch. R. 643.)

It has been held by the supreme court of the State of New York, in a case not reported, that the bankrupt's tenancy by the curtesy initiate, passes to the assignee in bankruptcy, under the act of congress passed in 1841, though such interest be not mentioned in the schedule of property. (*Williams v. Smith*, Gen. T. March, 1856.) Neither the tenant by the curtesy, nor one who claims under him is entitled, under the Massachusetts statute of 1807, giving relief to persons who make improvements upon lands which they afterward lose by reason of a defect in their title, to an allowance for the increased value of the premises by virtue of the buildings and improvements made by him. (*Romey v. Edwards*, 15 Mass. R. 291.)

§ 289. To enable the husband to acquire an interest in his wife's land, he must be such a person as the law allows to hold and enjoy real estate. Thus, an alien is not allowed at common law to hold and retain land for his own benefit, accordingly, if the husband be an alien, he will take no interest in his wife's real estate, unless he is naturalized or made a denizen.

It has been held in the State of Massachusetts, that an alien husband cannot hold the lands of his deceased wife as tenant by the curtesy, although he had made his preliminary declaration to become a citizen before the death of his wife, and completed his naturalization after her death and before suit brought by her heirs, the children of a former husband, to recover the premises which he claimed as tenant by the curtesy. (*Foss v. Crisp*, 20 Pick. R. 121.) The rule, however, is modified by the statutes of many of the states, and whether the husband can hold his wife's lands will depend upon the question as to his ability to hold any land.

Naturalization removes all defects and disabilities *ab initio*, but denization only removes them from the date of the instrument of denization, and therefore the extent of the husband's rights in his wife's property will depend upon the mode in which his disability

has been removed. The distinction, however, between a naturalized citizen and a denizen, which prevails in English law has no application in this country. By our law, there is no middle class between aliens and citizens, except that in some of the states an alien who has declared his intention to become a citizen is entitled to take and convey lands, the same as a citizen, although in no other respect is he favored beyond an alien who has taken no steps toward becoming a citizen.

§ 290. There are various ways by which the husband's right of tenancy by the curtesy may be defeated or barred. Thus, if the wife's seisin be defeasible by a condition annexed to the grant, and the condition be broken, and the donor enters, the husband's right to curtesy will be defeated, because the donor resumes his original and former estate, by which resumption the seisin of the wife is the same as if it never existed, it being the donor's re-entry *ab origine*, with all the rights, charges and incumbrances attaching to it before the condition was broken.

The recovery of the wife's estate in an action against the husband and wife will defeat the husband's title to curtesy, in consequence of the eviction of her seisin and possession. But if the recovery be afterward reversed, the husband will be entitled to curtesy.

There were many cases under the old practice of fines and recoveries, where curtesy was defeated or barred, which it is unnecessary to refer to, because fines and recoveries have been abolished in England, and the practice is nearly or quite unknown in the United States at the present day. (*Vide 1 Bright's Husband and Wife*, 152, 155, and authorities there cited.)

A conveyance in fee by a tenant by the curtesy, though by indenture duly recorded, and with a covenant of special warranty, is not a forfeiture of the estate. (*McKee v. Pfont*, 3 *Dall. R.* 486. *Jackson v. Mancius*, 2 *Wend. R.* 357.) Neither is the abandonment of an undivided portion of land by the tenant of the curtesy for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was not an ouster, a forfeiture of the estate. (*Witham v. Perkins*, 2 *Greenl. R.* 400.) Nor will any forfeiture of her estate by the wife defeat the husband's right by the curtesy. (*Smoot v. Lecatt*, 1 *Stew. R.* 590. 4 *Kent's Com.* 34.)

The husband does not forfeit his estate by the curtesy by his adultery. (*Sidney v. Sidney*, 3 *P. Wms. R.* 269-276.)

Whether an absolute divorce will destroy the right of curtesy, depends upon the statutes of the States, and there is a variety in the laws upon the subject. If the cause of the divorce arise before marriage, the right to curtesy, as well as to other rights growing out of the marriage, is gone; but if for causes subsequent to marriage, the rule is not absolutely stable and uniform. (*Vide 4 Kent's Com.* 34, note 6.)

In the States of Vermont and Connecticut, it has been expressly held that a divorce *a vinculo* terminates the husband's right to curtesy. (*Mattocks v. Stearns*, 9 *Vt. R.* 326. *Wheeler v. Hotchkiss*, 10 *Conn. R.* 225.) And in the State of Alabama it has been as distinctly held that a decree of divorce *a mensa et thoro* pronounced against the husband, does not bar him of the right to curtesy. (*Smoot v. Lecatt*, 1 *Stew. R.* 590.)

The whole subject of the husband's interest in his wife's real estate has been under review by the reformers, and great changes have recently been made by the potent hand of the law-giver, which will be succinctly noticed in another place.

Tenancy by curtesy is abolished by statute, and no longer exists in the States of California, Indiana, Michigan, and some others of the states.

CHAPTER XXIII.

THE WIFE'S INTEREST IN HER OWN PROPERTY—HER INTEREST IN HER HUSBAND'S PERSONAL ESTATE AFTER HIS DECEASE—HER PARAPHERNALIA AND PIN-MONEY—HER SEPARATE ESTATE.

§ 291. THE wife's real estate undergoes no change by the marriage, unless it has been the subject of settlement, and on the death of the husband it continues hers as before, with the restoration of all those powers of disposition which the coverture had suspended. With respect to her personal property we have seen that by the strict rule of the common law, marriage operates as a gift of the whole of it to her husband. This rule, however, may be very much modified in favor of the wife by a court of equity, which has the power of considering a *feme-covert* as sole, and will

often treat her as having interests and obligations distinct from those of her husband.

When the husband becomes civilly dead, the wife may hold personal property as a *feme-sole*, and her disability is entirely at an end on the termination of her husband's natural life, and all her rights with respect to her property, which were dormant during the marriage revive and come into being as soon as the coverture is at an end.

§ 292. By the common law, the wife's chattels real remain her property until they are reduced to the possession of the husband, and unless he disposes of them during his life-time, they survive to her. If the husband should alien a part of a term for years belonging to the wife, the remainder will survive to the wife; and she also takes by survivorship arrears of rent due on any lease made by her before marriage, or by her and her husband after her marriage. She also takes by survivorship all her choses in action, such as bonds, mortgages, and all negotiable securities passed to her previous to or during her marriage. So also the wife has by survivorship all actions which she and her husband might have had for injuries to her property or person. All these interests of the wife survive to her after the death of her husband. The way and manner in which the wife's survivorship in these interests may be barred, have been fully discussed heretofore, and the consideration of the subject need not be resumed here. (*Vide ante*, chap. xxxi.) The wife's equity to a settlement out of her own property, and against whom, out of what property, and when it is given, have also been considered in another place, and it is unnecessary to repeat the discussion here. (*Ib.*)

§ 293. There are some exceptions to the general rule at common law, that the whole of the personal estate of the wife becomes her husband's at the time of the marriage. Thus, what is understood as the wife's paraphernalia, belongs to the wife upon the death of her husband. This term comprises such apparel and ornaments of the wife as are suitable to her condition in life. The word is derived from the Greek word *parapherna*, that is, property belonging to the wife over and above the dower which she brought to her husband; and what articles are to be considered the wife's paraphernalia depends upon the rank and fortune of the parties. Pearls and jewels, usually or sometimes worn by the wife, properly fall within the term. So when the widow claimed her gold

watch, and several gold rings as paraphernalia, which had been given to her at the funerals of relations, the court decreed them to her. (*Mangay v. Hungerford*, 2 *Equity Cases Abridged*, 156, in margin.)

When gifts are made by husbands to their wives of pearls, jewels, and the like, and they are worn as ornaments, the articles are regarded as paraphernalia, and not as gifts to the separate use of the wives; and although the trinkets are only sometimes worn by the wife, such occasional use of them will constitute them her paraphernalia. (*Graham v. Londonderry*, 3 *Atk. R.* 394.) To constitute that kind of property called paraphernalia, they must have been the husband's, and given by him to his wife to be worn by her, or at least they must have been appropriated to her use. (*Graham v. Londonderry*, *supra*.)

Jewels purchased by the husband, and worn by the wife with others belonging to her husband, become her paraphernalia in the absence of evidence to the contrary; but family jewels, merely worn by the wife, do not become part of her paraphernalia. (*Jervoice v. Jervoice*, 17 *Beav. R.* 566.)

As these ornaments are intended for the use of the wife, they are usually given to her, and left in her custody, yet she has not the power of alienating them during coverture, and only gets an absolute title to them on the death of the husband. The husband has the power of disposing of them during his life, but in order to destroy the wife's right of survivorship, the disposition of the husband must be a complete sale. The husband's power over his wife's paraphernalia, is limited to acts which operate during his life, for he cannot dispose of such articles by will, neither can they be made liable to legacies. (*Tipping v. Tipping*, 1 *P. Wms. R.* 729. *Snelson v. Corbet*, 3 *Atk.* 369.)

§ 294. The paraphernalia of the wife are subject to the debts of the husband after his decease; but this rule is confined to the ornaments of the wife, such as jewels and a watch, for her necessary apparel is not liable to his debts. (2 *Black. Com.* 436. *Noy's Maxims*, ch. 49, p. 188.) This liability of the wife's paraphernalia to the husband's debts, exists both at law and in equity, but equity so far favors this claim of the wife as to permit her to indemnify herself out of the real assets of the husband, if his specialty creditors exhaust his personal estate in the satisfaction of their demands; in other words, although after the husband's death this species of

property is liable to his debts, if his personal estate is exhausted, yet the widow may recover from the *heir* the amount of what she is obliged to pay in consequence of her husband's specialty creditors obtaining payment out of her paraphernalia. (*Tipping v. Tipping*, 1 *P. Wms. R.* 729. *Snelson v. Corbet*, 3 *Atk. R.* 369.) It has been said, however, that the wife cannot be satisfied for this claim out of the husband's real estate at all events; for if the debts exhaust the husband's personal fortune, and the creditors are only by simple contract, and no trust is created of the real estate for the payment of debts, she can have no relief, and if the real estate be devised, and the debts exhaust the personal estate, the widow cannot have satisfaction decreed to her against the devisee; this equity is to be enforced only against the heir on whom the estate has descended, and he cannot have the paraphernalia applied in exoneration of the real estate. (*Vide Ridant v. Plymouth*, 2 *Atk. R.* 104. *Incedon v. Northcote*, 3 *ib.* 438. *Probert v. Morgan*, 1 *ib.* 440. *Clancy on Husband and Wife*, 96, 97. *Vide also Boynton v. Boynton*, 1 *Cow's R.* 106.)

§ 295. Upon this subject, Lord Macclesfield said, "that if there should not be assets, real and personal, at the testator's death, or at least at the time when the jewels or paraphernalia were applied to debts, then the paraphernalia should be liable." (*Burton v. Pierpoint*, 2 *P. Wms. R.* 79.) Upon this rule Mr. Roper remarks: "The above distinction taken by Lord Macclesfield, seems to be founded upon this principle, that when the wife's right is left to the provision of law, and the real and personal assets are insufficient to pay his debts, then for the sake of the creditors her paraphernalia must be applied in payment of their demands, and not detained from them in expectation of that which may never happen, a contingency of subsequent assets falling in; and that such possibility in contingency happening after the paraphernalia are so applied, shall not, for the sake of certainty and quiet, as also from the nature of such provision, entitle the wife, or the persons claiming under her, to institute proceedings for the purpose of recovering out of the accidental assets the value of the paraphernalia which had been so applied. But when they are given to the wife by will, and the real and personal assets are charged with debts and legacies, then, since the wife is made a legatee of her paraphernalia, she, as well as any other legatee, or her representative, will be entitled to an execution of the trust, and, upon the assets falling

in, to have them applied in the discharge of such legacy." (*Roper on Husband and Wife*, 146.)

If the husband in his life-time simply pledge or mortgage his wife's paraphernalia for money, his wife surviving him will be entitled to have them redeemed out of his personal estate, even to the prejudice of legatees; because her right is anterior and to be preferred to their claims, which are merely voluntary. (*Burton v. Pierpoint*, 2 P. Wms. R. 79.)

§ 296. The wife may bar her rights to her paraphernalia in several ways. Thus, if she entered into an agreement before marriage with her intended husband, that she would claim no part of his personal estate but what he should devise to her, this will be a bar to her right in her paraphernalia. (*Cholmely v. Cholmely*, 2 Vern. R. 83. *Read v. Snell*, 2 Atk. R. 642.)

So when the husband takes upon himself to bequeath to his wife her paraphernalia for life, and she does not claim them absolutely by her elder title as paraphernalia, it is presumed that her administrator after her death will not be entitled to them. (*Vide Clarges v. Albemarle*, 2 Vern. R. 247.) It is therefore to be considered as a legal inference, that if a widow, when her paraphernalia are bequeathed to her for life, do not manifest by some act her intention to take them by her elder and better title, she will be presumed to have elected to take them under the will, so as to bind her executor or administrator; and this seems to be the doctrine of the case of *Clarges v. Albemarle*, as understood by Mr. Bright. (*Vide 1 Bright's Husband and Wife*, 294.)

§ 297. Near akin to the wife's paraphernalia is what is familiarly known as the wife's pin-money. This is understood to be an annual income settled, or agreed to be settled, before marriage, by the husband on his intended wife, or allowed by him to her, after marriage, gratuitously for her personal and private expenditure, for clothes and ornaments of her person during the coverture. (*Clancy's Husband and Wife*, 376.) Pin-money is not regarded as an absolute gift from the husband to the wife, nor like money set apart for the sole and separate use of the wife during coverture, excluding the *jus mariti*, but as a sum allowed for the wife's personal expenses, and to deck her person suitably to her husband's rank, who has accordingly an interest in its expenditure. (*Howard v. Digby*, 8 Bligh's [N. S.] R. 269. *Jodrell v. Jodrell*, 9 Beav. R. 45.)

Pin-money proper is usually secured by the creation of a trust vested in trustees, by whose aid she may recover the arrears of it whenever the same is withheld. However, it seems to be settled that when the wife permits her pin-money to run in arrear for a considerable time, upon surviving her husband she will be permitted to claim arrears for one year only prior to his death. (*Aston v. Aston*, 1 *Ves. Sen. R.* 267. *Townsend v. Wyndham*, 2 *ib.* 7. *Peacock v. Monk*, *Ib.* 290. *Offley v. Offley*, *Prec. Ch.* 26.) This rule is adopted by equity, says Lord Brougham, not so much on account of the presumption of satisfaction of the wife's claim by her acquiescence, as to secure the appropriation of the money to the purpose for which it was intended. (*Howard v. Digby*, 8 *Bligh's [N. S.] R.* 269.) Should it appear that the wife has demanded her pin-money without success, perhaps she might be permitted to recover all arrears at her husband's death. (*Ridout v. Lewis*, 1 *Atk. R.* 269.)

§ 298. Where the provision is expressed to be made for particular purposes, as for the wife's apparel or private expenses, and these are all amply furnished by the husband, the wife will not be entitled to any arrears of her pin-money, which might otherwise be due at the time of the death of the husband; for this is considered a payment or satisfaction by the husband. (*Howard v. Digby*, *supra*. *Powell v. Hankey*, 2 *P. Wms. R.* 84. *Thomas v. Bennett*, *Ib.* 341. *Fowler v. Fowler*, 3 *ib.* 355.)

In the case of *Fowler v. Fowler*, Lord Talbot said that when pin-money was secured to the wife, and it appeared that the husband, nevertheless, provided her with clothes and other necessities, that circumstance, during the time that she was so provided for, would be a bar to any demand for arrears of pin-money. It is understood, however, that this case turned upon the doctrine of the satisfaction of a debt by a legacy. The husband settled one hundred pounds a year upon his wife for pin-money. Two years' arrears became due, when he gave her a legacy of five hundred pounds. After the making of the will another year's arrears became due, and then the husband died. Lord Talbot decided that the legacy was a satisfaction of the two years' arrears, because it was larger than the debt, and that the creditor and legatee being a wife made no difference. The rule is a reasonable one, and will not be departed from.

It follows from the nature and purpose of pin-money that the wife's executors have no claim against the husband or his estate,

even for one year's arrears. (*Howard v. Digby*, 8 *Bligh's* [N.S.] R. 271.)

It has been held that, when the wife is entitled to pin-money, and she is separated from her husband, no deduction will be made out of her pin-money for alimony, because she would have been entitled to maintenance beyond the pin-money if she and her husband had lived together. (*Ball v. Coutts*, 1 *Ves. & Bea. R.* 305. 2 *Bright's Husband and Wife*, 291.)

§ 298. The court will sometimes not only refuse to assist the wife to recover the arrears of her pin-money in the life-time of her husband, but will actually prevent her trustees by injunction, from using their legal remedies for the recovery of it. Thus, if the wife be guilty of criminal conversation she is not entitled to her pin-money, and should she attempt to recover it, the court would restrain her trustees by injunction from proceeding to get it. (*More v. Scarborough*, 2 *Eq. Ca. Ab.* 156.)

So, also, if the wife should elope from her husband without good and justifiable cause, this will be a bar to a recovery of her pin-money. It has been held, however, that the injunction will be granted on the ground of adultery, only in a case where the offense was plainly put in issue in the cause, and plainly proved. (*Moore v. Moore*, 1 *Atk. R.* 276.) If the wife leave her husband in consequence of ill-usage, or other reasonable grounds, or the husband have acquiesced in her departure, equity will not interfere.

The wife has not the same power with respect to her pin-money, that a *feme-sole* has in regard to her own property. She cannot convey, or in any way dispose of her interest in it to a third person. She may, indeed, bestow of the pence as she receives them, but she cannot make a total disposition of the entire annuity. Equity would not enforce or restrain such an act, because it would defeat the very intent and object of the first creation of the allowance, for it is designed especially for the private expense and personal use of the wife. (*Clancy's Husband and Wife*, 380, 381.)

§ 299. The distinct property which the wife has in her paraphernalia and pin-money, naturally leads to the consideration of the wife's separate estate at large. In passing, however, it may be remarked with respect to her paraphernalia, that what shall be so considered irrespective of the husband's debts, is provided for, and to some extent designated by the statutes of the several states. These statutory provisions will be noted in another place.

The subject of the wife's separate estate, independent of statute, is one of considerable importance, and the nature of it needs to be well understood. There are certain principles peculiar to this species of property, the manner of acquiring and enjoying it, the power and manner of disposition exercisable by the wife over it, and the aid afforded by equity in the protection of the estate, which must be fully comprehended before the subject is understood and properly appreciated.

§ 300. We have seen that at the common law, a *feme-covert* is incapable of possessing personal property as her own. But there may be a trust for her sole benefit which a court of equity will take care to see strictly performed. Property of any description may be limited to the use of a married woman; but whether that use shall be separate or not, and whether her husband shall be barred of the interest which the law gives to him in the possession of his wife, depends upon the intention of the donor. If the intention of the donor is ascertained to be that the use is for the wife alone, and not for her husband, equity will give effect to it without any regard to the legal maxim, that "the husband is the head of the wife, and, therefore, all that she has belongs to him." (*Finch's Law*, 29. *Clancy's Hus. & Wife*, 251.) And every kind of property, including estates in fee simple, and chattels personal, may be subject to a trust for the wife's separate use, which will be supported in equity. (*Baggett v. Meux*, 1 *Ph. R.* 628. *Newland v. Paynter*, 4 *Myl. & Cra. R.* 408. 10 *Sim. R.* 378.) But in all cases, the intention to create a trust estate for the wife must clearly appear. No technical words are necessary, provided they indicate with clearness and certainty, that such was the intention of the grantor. (*Hamilton v. Bishop*, 8 *Yerg. R.* 33.) The words "for her own use and benefit," or "to pay the same to her and her assigns," or "to pay the same into her own proper hands to and for her own use and benefit," have been held not sufficient to give the wife a separate estate. (*Kinsington v. Dolland*, 2 *Myl. & Keen's Ch. R.* 184. *Dakins v. Beresford*, 1 *Ch. Cas.* 194. *Tyler v. Lake*, 2 *Russ. & My. R.* 183.) On the contrary, the words, "for her own use," have been differently construed in this country. (*Vide Jameson v. Brady*, 6 *Serg. & Rawle's R.* 467.) Any words showing the intention will suffice. (*Gaines v. Poor*, 3 *Met. [Ky.] R.* 507.)

§ 301. With respect to the words which will be sufficient to impart an intention to create a trust for the wife, Judge Story has the following:

“On the one hand, if the language of a marriage settlement made before marriage, or if a gift or bequest to a married woman after marriage, be, that she is to have the property ‘to her sole use or disposal;’ or, ‘to her sole use and benefit;’ or, ‘for her own use and at her own disposal;’ or, ‘to her own use during her life, independent of her husband;’ or, ‘that she shall enjoy and receive the issues and profits;’ or, ‘that it is an allowance as, or for pin-money’ (*eo nomine*); in all these cases, the marital rights of her husband will be excluded, and the property will be for her exclusive use. So, a bequest to a married woman, ‘her receipt to the executors to be a sufficient discharge to the executors,’ is equivalent to saying to her sole and separate use. So, money paid to the husband ‘for the livelihood of the wife;’ and money given to a married woman for her own use, ‘independent of her husband,’ and money or stock given to such married woman, ‘not to be disposed of by her husband, without her consent,’ will be construed to give her the property to her sole and separate use. So, a bequest to a married woman and her infant daughter, to be equally divided between them, share and share alike, ‘for their own use and benefit, independent of any other person,’ will be construed to mean to their sole and separate use. So, a bequest to a married woman, ‘for her benefit, independent of the control of her husband,’ will receive the like construction. In all these cases, the words manifest an unequivocal intent to exclude the power and marital rights of the husband.

“On the other hand, a gift or bequest after marriage, to a married woman, ‘for her own use and benefit,’ or ‘to pay the same into her own proper hands to and for her own use and benefit,’ have been held not to amount to a sufficient expression of an intention to exclude the marital rights of the husband; for, although the money is to be paid into her own hands, or to her own use, yet there is nothing in that inconsistent with its being subject to his marital rights. So, an annuity given in trust for a married woman, for life, ‘to pay the same to her and her assigns,’ will not exclude the marital rights of the husband.” (2 *Story’s Eq. Jur.* §§ 1382, 1383.)

Judge Story gives no express opinion of his own upon the subject, but simply gives the tenor of the authorities, which he cites in order under the sections quoted.

§ 302. The language of the trust is usually interpreted to sustain the marital rights of the husband, if it can, by any reasonable construction, be interpreted to effect that object. A case in the English high court of chancery illustrates very nicely this inclination of the courts. George Hoffman, by his will, gave to his sister Mary Brown, and his brother, William Hoffman, certain moneys, saying, "which sum or sums, the interest to be equally divided between them, the principal to be lodged in the bank or some secure place, at the death of my sister Mary Brown, then one-half of the principal to be equally divided between her children; the husband of the said Mary Brown by no means to have any part whatever, but to be entirely for the poor children, and should she have none alive, in that case the said sum is to become the property of my brother William's children, equally to be divided; and after the death of the said brother and his wife, then the other half of the principal is to be equally divided among his children." Daniel Brown, the husband of Mary Brown, became a bankrupt, and, upon the question whether the share of his wife was given to her separate use for life, the master of the rolls said: "Upon the first point it has been contended, that there is a plain, evident intention, that the interest should be to the sole and separate use of Mary Brown. I profess, upon reading it over and over again, I can hardly bring myself to think such an argument has any foundation whatever, for nothing is given to her but the interest, no part of the principal, and it is given in words that cannot by any ingenuity be tortured to deprive the husband of that right the law gives him. It is said, these words must mean that the husband shall have no part whatsoever of the interest before given; otherwise they are unnecessary and superfluous. This is admitted; but it is no uncommon thing for the testator to suppose the father would have the fingering of the money given to the children, and it might be inserted to prevent that. I cannot apply it to any thing but the last antecedent. What is to be divided among them? Not the interest; for they had no share of that. The interest only, therefore, is given to the wife, and, there being no restriction, it must be subject to the right of the husband; but his assignees must make a provision for the wife, before they can call it out of

this court." (*Brown v. Clark*, 3 Ves. R. 166.) Here it will be observed the language is very nicely interpreted to sustain the marital rights of the husband, but in all cases the courts hold that the intention to deprive the husband of his rights must be clear and unequivocal.

§ 303. It was formerly doubted whether a female could take an estate to her separate use, so that her rights could be protected as against her husband, unless trustees were interposed. But it is now well settled that the intervention of trustees is not indispensable, though it is conceded that in strict propriety the better practice is to interpose trustees. It has been expressly held, upon authorities a century old, that when personal chattels are bequeathed to a *feme-covert* for her separate use, or to a single woman free from the control of her future husband, the court of chancery will protect her interest therein against the creditors of her husband, although no trustee is named in the will of the testator to hold them for her separate use. (*Shirley v. Shirley*, 9 Paige's Ch. R. 363.) Or, as Judge Story extracts the rule from a large number of authorities which he cites, both English and American, "Whenever real or personal property is given, or devised, or settled upon a married woman, either before or after marriage, for her separate and exclusive use, without the intervention of trustees, the intention of the parties shall be effectual in equity, and the wife's interest protected against the marital rights and claims of her husband. In all such cases the husband will be held a mere trustee for her; and, although the agreement is made between him and her alone, the trust will attach upon him, and be enforced in the same manner and under the same circumstances that it would be if he were a mere stranger." (2 Story's Eq. Jur. § 1380.)

So the rule seems to be well settled that in equity no trustees are necessary, whether the devise or settlement was before or during coverture, or concerning real or personal property. (*Vide Jamison v. Brady*, 6 Serg. & Rawle's R. 467. *Abrams v. Whitmore*, 4 Dessau. [S. C.] R. 255.)

§ 304. An estate to the separate use of a married woman may be created either before or during coverture. Before marriage it may be created by the woman herself of her own property, or by the intended husband, or by a stranger. During the marriage the estate may be created by the husband, or by a stranger, but not by the wife; as she would then be rendered incapable of disposing

of any property which had not been already limited to her sole use. (*Coomes v. Elting*, 3 *Atk. R.* 679.) Before marriage a woman may vest her entire fortune in trustees for her own use, so as to deprive her intended husband of any share in it or control over it, and she may make such a settlement of it as to enable herself to carry on trade with her own money, and not to render it or the produce of it liable to the debts of her husband. (*Jarman v. Woolstan*, 3 *Term R.* 618. *Dean v. Brown*, 12 *Eng. C. L. R.* 62.) But a disposition of her property for her separate use previous to her marriage, may be impeached by her husband, if any fraud has been practiced upon him with respect to it. If it be made without her intended husband's privity, it will be regarded as being in derogation of the rights of marriage, and will not bind him. (*Clancy's Husband and Wife*, 252. *Vide also Linker v. Smith*, 4 *Wash. C. C. R.* 224.)

It has been held that no conveyance of a term for years before marriage, in trust for the separate use of a woman, whether it be made by herself or by any one else, will bar her future husband's legal right over it, unless it be made with his privity and consent. But the validity of such a trust, especially from a third person, is now fully established, and when a term for years is settled to the wife's separate use, the husband cannot dispose of it. (*Tullett v. Armstrong*, 4 *Myl. & Cra. R.* 395.) If the trust, however, is confined to a particular coverture, it will of course be inoperative against a second husband. (*Bradley v. Hughes*, 8 *Sim. R.* 149. *Knight v. Knight*, 6 *ib.* 129. *Benson v. Benson*, *Ib.* 126.) A gift to a woman then married "for her whole and sole use during her life, free from the control of any future husband," has been held effectual as well during the then existing as a future coverture. (*Steedman v. Poole*, 6 *Hare's R.* 193. 11 *Jur.* 449, 555.)

The general rule is that in equity the wife is capable of taking real as well as personal property, of every name and nature, to her own separate use, and of holding it independently of her husband. (*Suiter v. Turner*, 10 *Iowa R.* 517.) And when both husband and wife have always treated as the wife's separate property, money and notes taken for the loan of money belonging to her before or during marriage, her right to dispose of the same will be recognized by both law and equity in the State of Vermont, and by equity everywhere. (*Caldwell v. Renfrew*, 83 *Vermont R.* 213.)

§ 305. When the husband, before marriage, agrees in writing that his wife shall be entitled to specific parts of real or personal estate for her personal use, but, in consequence of the property not having been so actually settled, the legal title to it becomes vested in him by the subsequent marriage, in all such cases the husband will be a trustee for her separate use. The power of the wife over her separate property may be qualified by the terms of the instrument securing it to her. Thus, when there was a bequest of money and leaseholds to a *feme-sole*, "for her own absolute use, without liberty to sell or assign during her life," it was held that she took the property absolutely, but without any power to dispose of it during her life. (*Baker v. Newton*, 2 *Beav. R.* 112. 2 *Story's Eq. Jur.* § 1382, a.)

If the agreement merely gives to the wife disposing power over her property in general terms, it will be considered to apply only to what she has at the time, and not to subsequent acquisitions. (*Pilkinton v. Cuthbertson*, 1 *Bro. P. C.* 337.)

A devise to trustees for the wife's separate use in terms which would execute the use in the wife, will be held to vest the legal estate in the trustees, in order to effectuate the testator's intention by excluding the control of the husband. (*Neville v. Saunders*, 1 *Vern. R.* 415. *Jones v. Say*, 1 *Eq. Ab.* 383. *Harton v. Harton*, 7 *Term R.* 652. *Hawkins v. Luscombe*, 2 *Swanst. R.* 391.) But it is said that if the trust be secured by deed in similar terms, it will not be so construed. (*Williams v. Wales*, 13 *Mees. & Wels. R.* 166.)

When the husband conveys property to a trustee for his wife, she takes the same, as against him, as a separate estate. (*Spencer v. Godwin*, 30 *Ala. R.* 355.)

§ 306. With respect to the wife's power of disposition over her separate estate, much depends upon the fact as to whether or not there are conditions annexed to her power of disposal or enjoyment thereof. In regard to personal estate, it has long been settled that when personal property is actually given or settled, or is agreed to be given or settled, to the separate use of a married woman, she may dispose of it as a *feme-sole* to the full extent of her interest. (*Fettiplace v. Gorges*, 1 *Ves. Jun. R.* 46.) The general principle applicable to all such cases is, that when once the wife is permitted to take personal property to her separate use as a *feme-sole*, she must take it with all its privileges and incidents, one of which is the

jus disponendi; and a court of equity will enforce all of the rights of the wife as against the husband and his representatives, and all others. (*Rich v. Cockell*, 9 *Ves. R.* 369. *Wagstaff v. Smith*, *Ib.* 520. *Burchall v. Burchall*, 3 *Add. Ecc. R.* 263. *Doe v. Staples*, 2 *Term. R.* 695. *Wright v. Englefield*, *Ambler's R.* 468. 2 *Edw. R.* 239. *Pybus v. Smith*, 3 *Bro. Ch. R.* 339. *Dowell v. Dew*, 1 *Younge & Coll. New R.* 545.) And the wife has the same power of disposing of reversionary interests, when settled to her separate use, as of interests in possession. (*Sturgis v. Corp*, 13 *Ves. R.* 190. *Headen v. Mosher*, *McClelland & You. R.* 89.) So, also, it has long been settled with respect to rents and profits of real estate, a gift of them to, or rather in trust for, the wife for her separate use, enables her to dispose of them as a *feme-sole*. (*Hulme v. Tenant*, 1 *Bro. C. C.* 16.) The principle is also well settled that the wife has a general power to dispose of the savings arising from her separate property, for the reason that having the power to dispose of the principal, she has necessarily the like power over its produce; for the sprout is to savor of the root, and to go the same way. (*Gore v. Knight*, 2 *Vern. R.* 535. *Gold v. Rutland*, 1 *Eq. Ca. Ab.* 346, *pl.* 18. *Cecil v. Juxon*, 1 *Atk. R.* 278.) But when the wife does not dispose of such savings, the quality of separate property ceases at her death, and the husband is entitled to them by his marital right. (*Molony v. Kennedy*, 10 *Sim. R.* 255. *Tugman v. Hopkins*, 4 *Man. & Gr. R.* 389.) Arrears of separate estate, which were due to the wife at the time of a second marriage, have been held to belong to her as separate estate. (*Ashton v. McDougall*, 5 *Beav. R.* 56.) The wife having the power of absolutely disposing of her separate estate, she may consequently make grants out of it, or otherwise incumber it. (*Wagstaff v. Smith*, 9 *Ves. R.* 521. *Parkes v. White*, 11 *ib.* 210. *Power v. Bailey*, 1 *Ball & Beatty's R.* 49.)

§ 307. With respect to the separate estate of a *feme-covert*, which courts of equity have long recognized and acted upon, in a late case in the supreme court of the State of New York, it was said: "Such separate estate was a provision for the wife's separate use and benefit, independent of her husband, in which he had no interest, over which he had no right of control, which was usually, though not necessarily or invariably, held by a trustee, and which she disposed of by way of appointment. She could not, at common law, hold the legal title to property, either personal or real, for the

reason that during her state of coverture she and her husband were considered one person, and her identity, so far at least as the right to hold was involved, was lost or merged in him. Hence, there was no way at law in which such separate estate of the wife could be reached to satisfy the demands upon it, however equitable and just; and although they may have been created by her for her individual benefit and upon the credit of her separate estate. (2 *Story's Eq. Jur.* §§ 1366, 1367, 1368.) To prevent the great injustice which might otherwise arise, and inasmuch as the wife's creditors had not the means at law of compelling payment of her debts which she contracted to pay out of her separate estate, courts of equity undertook to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they could be satisfied." (2 *Spence's Hist. of Eq. Jur. of Ch.* 324.) The judge then goes on to show that the only difference between the separate estate of a married woman, as recognized and acted upon by courts of equity for centuries, and their title to property acquired or held under a statute is, "that the former is an equitable and the latter a legal estate or title." (*Colvin v. Currier*, 22 *Barb. R.* 371, 387.)

§ 308. It was formerly a matter of doubt, in case the trust was created before coverture and rested in an antenuptial agreement between husband and wife, whether the wife could dispose of her separate real estate, although it was conceded that she had full power over her separate *personal* estate. On this subject Lord Hardwicke said: "Agreements for settling estates to the separate use of the wife on marriage are very frequent, relating to both real and personal estate. As to personal property, undoubtedly, when there is an agreement between husband and wife before marriage, that the wife shall have to her separate use either the whole or particular parts, she may dispose of it by an act in her life or will. She may do it by either, though nothing is said of the manner of disposing of it. But there is a much stronger ground in that case than there can be in the case of real estate, because that is to take effect during the life of the husband; for, if the husband survives he is entitled to the whole, and none can come into a share with the husband on the statute of distributions. Then such an agreement binds and bars the husband, and consequently bars every body. But it is very different as to real estate, for her real estate will descend to her heir at law, and that more or less

beneficially; for the husband may be tenant by the curtesy if they have issue, otherwise not. But still it descends to her heir at law. Undoubtedly, on her marriage, a woman may take such a method, that she may dispose of that real estate from going to her heir at law, that is she may do it without a fine. But I doubt whether it can be done but by way of trust or of power over an use." (*Peacock v. Monk*, 2 *Ves. R.* 191.)

§ 309. With respect to the distinction made by Lord Hardwicke between the real and personal estate of the wife, and his doubt in regard to her power over her separate real estate, Judge Story says: "But this doubt, however powerfully urged upon technical principles, has been overcome; and the doctrine is now firmly established by the highest authority, that in such a case courts of equity will compel the heir of the wife to make a conveyance to the party in whose favor she has made a disposition of the real estate; in other words, he will be treated as a trustee of the donee, or appointee of the wife. So that it may now be laid down as a general rule, that all antenuptial agreements for securing to a wife separate property will, unless the contrary is stipulated or implied, give her, in equity, the full power of disposing of the same, whether real or personal, by any suitable act or instrument in her life-time, or by her last will, in the same manner and to the same extent as if she were a *feme-sole*. And in all cases where a power for this purpose is reserved to her by means of a trust, which is created for the purpose, she may execute the power without joining her trustees, unless it is made necessary by the instrument of trust." (2 *Story's Eq. Jur.* § 1390.)

And it has been held that a *feme-covert* having a separate estate may dispose of it or of its income by gift or loan to her husband; and that his receipt or use of her money with her consent, is sufficient to raise the presumption of a gift to him. (*Hinney v. Phillips*, 50 *Penn. R.* 382. *Magler v. Ingersoll*, 7 *ib.* 204. *McGlinsey's appeal*, 14 *Serg. & Rawle's R.* 64. *Ware v. Hagner*, 3 *Whart. R.* 48.) This doctrine, of course, is necessarily limited to those cases where there is no restraint upon the wife, by the instrument giving her the separate property, as to her power of disposing of it. In the absence of any fetter on anticipation, the wife has the same power over her separate estate as if she were unmarried. Her disability to bind herself or her general property is left untouched but she may pledge or bind her separate prop-

erty, and the court may proceed *in rem* against it, though not *in personam* against herself unless there is a statute allowing it.

§ 310. There seems to be a material distinction between real and personal estate of the wife, in regard to the wife's power over it, when the power rests merely upon a post-nuptial agreement of the husband. As to her personal estate, the wife's power to dispose of it only affects the husband's rights and hence his assent to the disposition of it will bind him. But the case is different with respect to real estate, for here her heirs may be affected. The husband may bind his own interest by his post-nuptial agreement, but he cannot encroach upon the rights of the heir who is not a party to the agreement. The heir in such a case will take the real estate of the wife unaffected by the agreement. (2 *Story's Eq. Jur.* § 1391 and the authorities there cited.)

With respect to the wife's power over real estate given to her by a third person during coverture for her separate use, "the received doctrine seems to be, that if an estate is, during coverture, given to a married woman and her heirs for her separate use, without more, she cannot in equity dispose of the fee from her heirs; but she must dispose of it, if at all, in the manner prescribed by law." And yet, in such a case, if power is expressly given to the wife to dispose of the estate by the terms of the gift, courts of equity will enable her to exercise such power, notwithstanding no trustees are interposed. (2 *Story's Eq. Jur.* § 1392, and authorities there cited.) There is no doubt that a gift of personal estate or of the rents and profits of real estate, to a married woman for her separate use during her life, would give her a complete power to dispose of the same. (*Ib.*)

In 1838, Lord Langdale, master of the rolls, reviewed the contradictory cases, and came to the conclusion, first, that if the gift be made to a woman for her sole and separate use, without more, she has, during coverture, an alienable estate independent of her husband; second, that if the gift be made to her sole and separate use without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate; but that in either case she has, while discover, the power of alienation. The restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture. (*Tullett v. Armstrong*, 1 *Beavan's R.* 1, 20.) And subsequently the lord chancellor considered that case as settling the doctrine of the court. (*Baggett v.*

Meux, 1 *Phillip's R.* 627. 2 *Kent's Commentaries* 165, notes a, and 1.)

Personal property settled upon the wife as her separate estate goes to her next of kin, after her death. (*Gamble v. Naine*, 5 *Sand. R.* 465.)

§ 311. When no mode of disposition is prescribed for the wife to dispose of the funds settled to her separate use, any appointment of such property in writing is sufficient. But there are cases in which the property is not only limited to the separate use of the wife, but she has expressly given to her a power of appointment.

When there is an express limitation *for life*, with a power to dispose by will, the interest is equivalent only to an estate for life, and the power is to be executed *prima facie* at least by will, on the ground that a partial interest having been expressly given, it will not be permitted, contrary to the intention expressly declared, to be enlarged by implication. (*Bradley v. Westcott*, 13 *Ves. R.* 445, 451. *Anonymous*, 3 *Sim. R.* 71. *Major v. Lansley*, 2 *Russ. & Mylne's R.* 355.)

From the authorities the following conclusion may be drawn: That when the wife takes an express estate for life in the fund, with a power to appoint the principal after her death, in such instances the wife can only dispose of the capital by an execution of her power, which may be immediate, if the power authorize a deed; but if it require the appointment to be made by will only, the disposition cannot take effect till after the appointor's death, and the wife is precluded from making an immediate disposal of the fund. (*Doe v. Thorley*, 10 *East's R.* 438. *Sackett v. Wray*, 4 *Bro. C. C.* 483.)

§ 312. It has been held sometimes, that although an express estate be given to the wife's separate use for life, with a power to dispose of the principal, yet if in default of appointment such principal be limited to her executors or administrators, and not to her next of kin, the absolute interest in the fund will vest in her, and be disposable with her husband's concurrence, without resort to the particular power given her for the purpose. Upon this subject, Mr. Jacob remarks: "A distinction is to be noticed between these cases where, after a limitation to a party for life, in default of appointment to the same party or to his or her representatives, and those in which, in default of appointment, the principal is limited or results to other persons. In cases of the latter class,

the donee has not the absolute interest; if the power be not exercised, the limitation in default of appointment takes effect and vests the principal in others; it can therefore only be disposed of by virtue of the power. In cases of the former class the donee has the entire beneficial interest in the principal, and consequently (if not under disability) may dispose of it independently of the power by virtue of the general right of alienation which is incident to property. But if the donee be a *feme-covert*, her absolute right to the property does not carry with it a general right of alienation unless the property be given to her separate use. If the principal be in effect given generally to her separate use, she has an unqualified power of disposition; if not, it seems that she can only dispose of it by means of the power." (2 *Rop. Husband and Wife*, 200 n.)

Mr. Roper is of the opinion that when the limitation in default of appointment is to the wife's executors or administrators, it will be required that she should execute her power in order to dispose of the fund during the marriage. (*Ib.* 212.)

An express provision that in the event of the wife surviving the husband the property shall be absolutely hers, implies an exclusion of a power of so appointing it during the coverture as that it shall not in that event belong to her. This doctrine has been recognized in several instances in the English courts. (*Vide Richards v. Chambers*, 10 *Ves. R.* 380. *Lee v. Muggeridge*, 1 *Ves. & Beames' R.* 118.)

In a comparatively late case, where the fund was limited in trust for the separate use of the wife during the joint lives of herself and her husband, and if she should survive him, then in trust for her and her assigns for her life, and after her decease, as to one moiety of the fund, for her use, to be disposed of by her in such manner as she should, by deed or will, notwithstanding her coverture, direct, it was held that she could not dispose of the moiety during the coverture. (*Nixon v. Nixon*, 2 *Jones & Lat. R.* 416.)

Where an appointment by the wife is necessary, the trustees acting on her behalf need not join as parties to it unless their concurrence be expressly required by the power. (*Grigley v. Cox*, 1 *Ves. Sen. R.* 518. *Essex v. Atkins*, 14 *Ves. R.* 547. *Pybus v. Smith*, 1 *Ves. Jun. R.* 169, 393.)

§ 313. If the fund be given to the wife, to be "at her sole and separate disposal," or to be disposed of by her "by will or deed," notwithstanding coverture, the absolute fund will vest in her

which she may dispose of as a *feme-sole* under her general power to do so, and without any of the ceremonies required by the special power provided for her. (*Robinson v. Dugate*, 2 *Vern. R.* 181. *Maskelyne v. Maskelyne*, *Ambler's R.* 750. *Phillips v. Chamberlaine*, 2 *Ves. R.* 51, 58. *Hixon v. Oliver*, 13 *ib.* 108.)

There is a species of limitations, says Mr. Bright, very similar to those in which the wife takes only an estate for life, with a power of appointment, which, without minute attention, are likely to mislead, since such limitations have been held to give the wife an absolute interest, on the ground that it was the testator's intention that the wife should have the property absolutely, qualified and guarded only during the coverture in respect of her situation as a married woman, and to prevent the fund, upon her death, becoming the property of her husband as her administrator, in the event of his being the survivor. (2 *Bright's Husband and Wife*, 243, referring to *Elton v. Sheppard*, 1 *Bro. C. C.* 532.)

In a late case where a testator desired his daughter's share to be secured in the funds, and for his trustee to pay in the dividends, and he wished that neither the principal nor the interest of the funds should be subject to the control of any husband she might marry, but that the same should be subject to her will only, properly executed, whether covert or sole, at her decease, it was held that the daughter took an absolute interest. (*Tawney v. Ward*, 1 *Beav. R.* 563. And vide *Baker v. Newton*, 2 *ib.* 112. *Mayer v. Townshend*, 3 *ib.* 443.)

It seems from the authorities that if the interest of a fund be directed to be paid as a *feme-covert* should appoint, by note or writing under her hand, and for want of such appointment, then into her own hands for her separate use for life, she may dispose of it either under her general power incident to her life estate, or by the particular mode prescribed by the special authority. (*Vide Witts v. Dawkins*, 12 *Ves. R.* 501. *Brown v. Like*, 14 *ib.* 302. *Bullpin v. Clarke*, 17 *ib.* 365. *Stead v. Nelson*, 2 *Beav. R.* 245.)

§ 314. The American authorities are very decided that where property is settled to the separate use of a *feme-covert*, she is to be regarded as a *feme-sole* as to such separate estate, to the extent that she may dispose of it without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires such separate estate, and although a particular mode of disposition be specifically pointed out in the instrument or

deed of settlement, it will not preclude her adopting another mode of disposition; unless there are negative words restraining her power of disposition, except in the very mode so pointed out, and she may give her separate property to her husband or to any other person, if her disposition of it be free, and not the result of flattery or force, or improper treatment. (*Firemen's Ins. Co. of Albany v. Bay*, 4 Barb. R. 407. *Guild v. Peck*, 11 Paige's Ch. R. 475. *Vezonneau v. Pegram*, 2 Leigh's R. 183. *Jaques v. Methodist Episcopal Church*, 17 Johns. R. 548. *Whitall v. Clark*, 2 Edw. Ch. R. 149.) And the doctrine has been carried so far that, by the permission of her husband, the wife may become a sole trader, and be entitled to all her earnings. (*Megrath v. Robertson*, 1 Dessau. R. 445.)

It has been held that a woman whose husband is banished, and his estate confiscated, is to be considered as a *feme-sole* in every point of view. (*Wright v. Wright*, 2 Dessau. R. 244.) And it was even held in one case that if the husband flies the country and remains absent, his wife is regarded as a *feme-sole*, and has the right to convey property. (*Troughton v. Hill*, 2 Hayw. R. 406.) The wife may mortgage her separate property for her husband's debts. (*Demerest v. Wyncoop*, 3 Johns. Ch. R. 123.) And she may execute, by will, a power in favor of a husband given to her when sole, over her real estate. (*Bradish v. Gibbs*, 3 Johns. Ch. R. 523. *Burr v. Burr*, 7 Hill's R. 207, 213.) But in Connecticut, it has been held that a will, executed by a *feme-covert*, devising her real estate to her husband, is void. (*Fitch v. Brainard*, 2 Day's R. 163.)

A married woman can do no act which tends to the destruction of her trust estate; as, when she gave a note with her husband, upon which a judgment was obtained and the trust estate sold, a court of equity will enjoin the proceedings at law. (*Watson v. Cheshire*, 1 McCord's Ch. R. 241.) Words implying a separate use in a wife, will be construed a separate estate. When a father makes a deed of gift to his married daughter of personal property, the court will presume he intended to give her a separate estate. (*Johnson v. Thompson*, 4 Dessau. R. 458.)

Equity will give effect to a deed conveying property to a *feme-covert* for her exclusive use even when no trustee is appointed, and will consider the husband a trustee, although, of course, to create a trust estate, the intent must be clear. (*Harkins v. Coalter*, 2 Por-

ter's R. 463.) An agreement entered into before marriage with her husband by the wife, that she shall have the power to dispose of her real and personal estate during coverture, will enable her to do so. Although such agreement becomes extinguished at law, by the subsequent marriage, yet equity supports it, and will compel the husband to perform it. The wife has the right not only of selling her separate estate but with the proceeds thereof of purchasing other property, even from her husband, and to hold the substituted property as her separate estate, free from the control or debts of her husband. And she may purchase with her separate estate either mortgages or judgments against her husband, and hold such securities as a part of her separate estate, and enforce the collection thereof by a sale of the mortgaged premises, or of the lands subject to the lien of the judgments. And at the sale she may purchase in her own name, the real estate of her husband, and hold the same as part of her separate estate. (*Strong v. Skinner*, 4 *Barb. R.* 546.)

§ 315. A *feme-covert* may, either in person or by her legally authorized agent, bind her separate estate with the payment of debts contracted for the benefit of the estate, or contracted upon the credit of that estate, to the same extent that the estate of a *feme-sole* is chargeable with her debts, at common law. (*North Am. Coal Co. v. Dyett*, 7 *Paige's Ch. R.* 15.) Although she is incapable of charging herself at law, and equally incapable in equity of charging herself personally with debts, yet the courts have often held that separate debts contracted by her expressly on her own account, shall in all cases be considered an appointment or appropriation for the benefit of the creditor, as to so much of her separate estate as is sufficient to pay the debt, if she be not disabled to charge it by the terms of the deed of settlement. (*Gardner v. Gardner*, 22 *Wend. R.* 528. *Murray v. Bartlett*, 4 *Sim. R.* 82.) Chancery considers the debt as a valid charge *pro tanto*, and will at least enforce its collection specifically, by fixing it as a lien upon the separate estate. (*Gardner v. Gardner*, *supra*. *Owens v. Dickenson*, 1 *Craig & Phil. Ch. R.* 48.) The wife may contract such debt directly to her husband. In such case she will be considered as acting as a *feme-sole*, or under a power of appointment in favor of her husband. (*Gardner v. Gardner*, *supra*. *Heatley v. Thomas*, 15 *Ves. R.* 596.) She may deal with her husband or with her trustee in regard to her separate estate. She

may go surety for her husband, mortgage her estate to secure his debt, or otherwise charge her estate on his account. (*Janes v. Fisk*, 9 *Sme. & Marsh. R.* 144. *Barnett v. Lichtenstein*, 39 *Barb. R.* 194.)

Chancellor Kent was of the opinion that the power of disposition of the separate estate of the wife by her, is not absolute, but only *sub modo*, to the extent of the power given her by the instrument; and if the instrument points out a particular manner of disposition, that then no other can be adopted, although there is no express prohibition of any other mode; and there are other respectable authorities of the same purport. (*Jacques v. Methodist Episcopal Church*, 3 *Johns. Ch. R.* 77. *Lancaster v. Dolan*, 1 *Rawle's R.* 231. *Thomas v. Farwell*, 2 *Wharton's R.* 11. *Morgan v. Elam*, 4 *Yerg. R.* 375. *Rogers v. Smith*, 4 *Penn. R.* 93.) But the better opinion is that a *feme-covert* is absolutely a *feme-sole* with respect to her separate estate, when she is not specially restrained by the instrument under which she acts, to some particular mode of disposition; and although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition, unless there are words restraining her power of disposition to the very mode so pointed out. (*Jacques v. Methodist Episcopal Church*, 17 *Johns. R.* 548. *Vezonneau v. Pegram*, 2 *Leigh's R.* 183. *West v. West*, 3 *Randolph's R.* 373. *Whitaker v. Blair*, 3 *J. J. Marsh. R.* 239. *Strong v. Skinner*, 4 *Barb. R.* 546, 553. *MacIn v. Burroughs*, 14 *Ohio, St. R.* 519. *Leaycraft v. Hadden*, 5 *Green's Ch. R.* 512.)

§ 316. The rule with respect to the wife's power to charge her separate estate, has been recently explained by the court of appeals of the State of New York, where it was held that a *feme-covert* does not charge her separate estate by the execution of a promissory note with her husband and as his surety, not for her own benefit or the enhancement of her estate, and further that equity recognizes a married woman's debt and charges it upon her separate estate, not on the ground that the contracting it is of itself an appointment or charge, but because, when contracted on the credit of the separate estate, or for its benefit, or that of the woman, it is just that the estate should answer it. But that when the married woman is a mere surety, then equity will not enforce against her a promise which is void at law, and in such a case her separate estate can only be charged by virtue of some instrument for that express purpose. (*Yale v. Dederer*, 18 *N. Y. R.* 265.)

And it was held by the same court in the same case, upon another hearing, that in order to create a charge upon the separate estate of a *feme-covert*, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself, and that the signing of a promissory note by a wife as the mere surety of her husband, though she intended to charge her separate estate, did not have the effect to charge it. (*Yale v. Dederer*, 22 N. Y. R. 450.)

§ 317. When the case of *Yale v. Dederer*, was last before the court of appeals of New York, Selden, J., went into an elaborate review of the cases upon the subject of the power of the wife to charge her separate estate, and the ground upon which a charge was established was distinctly stated. The judge substantially remarks, that if the instrument by which the wife's separate estate was created, conferred upon her either a general or qualified power of disposition, no one ever questioned her right to execute this power; but that independently of any such special authority, the right of the wife to dispose of or charge her separate property was established soon after the introduction of such estates, upon the ground that the right of disposal was a necessary incident of the right of property; and that this universal *jus disponendi* was the sole and only foundation of this right. This doctrine the learned judge extracted from the leading and standard authorities upon the subject, both English and American. Assuming this doctrine to be the foundation of the right of the wife in such cases, it is plain that to avail herself of it, she must make some specific disposition of the specific property itself. It is clearly impossible to deduce from the *jus disponendi*, which accompanies all rights of property, power to make any contracts, except such as related directly to the property to which the right of disposition is attached.

It is frankly admitted that some of the earlier English authorities established the doctrine that the separate estate of a married woman was liable for the payment of her bond, although the bond in no way referred to such separate estate, and even when the bond was given for money lent to the husband; and upon the same principle the separate estate of the wife would be liable for all of her debts, however created, whether by bond, note, or by a mere oral promise. While all of the English chancellors, from Lord Loughborough to and including Lord Cottenham, have held to the

doctrine of this liability of the wife's separate estate, they have greatly fluctuated in regard to the principle or theory upon which the doctrine is sustained. The courts of New York have never, as yet, adopted the doctrines of the English court of chancery on the subject; certainly not to their full extent; and, in the judgment of Judge Selden, it would be inexpedient to do so. The learned judge remarks: "If we attempt to follow a class of decisions which obviously rest upon no solid basis of principles, we can never arrive at any settled conclusion. * * * No rule can ever be stable the reasons for which are constantly changing. If we desire precision and certainty in this branch of the law, we must recur to the foundation of the power of a *feme-covert* to charge her separate estate; and this has heretofore arisen solely from her incidental power to dispose of that estate. Starting from this point, it is plain that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would, of course, become a lien, upon a well founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgages for purchase-money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be tested by the same principles and rules of evidence which are applied to similar questions in other cases."

The view of Judge Selden was concurred in, and adopted by a majority of the court, and it was accordingly held "that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate." This is substantially the doctrine of the English court of chancery, that the court has no power against a *feme-covert in personam*, but that, if she has separate property, the court has control over that separate property. But in all cases the court must proceed *in rem* against the property. (*Francis v. Wigzell*, 1 *Madd. R.* 258.)

In the case of *Francis v. Wigzell*, Sir Thomas Plumer said: "There is no case in which this court has made a personal decree against a *feme-covert*. She may pledge her separate property, and make it answerable for her engagements; but, when her trustees are not made parties to a bill, and no particular fund is sought to be

charged, but only a personal decree against her, the bill cannot be sustained." And in a case before the late assistant vice-chancellor, Sandford, of the New York court of chancery, it was expressly held that the separate estate of a married woman is not always liable for her debts; that the debt must have been contracted either for her separate estate, or relying on it for payment. (*Curtis v. Engel*, 2 *Sand. Ch. R.* 287. *Vide also Frazier v. Brownlow*, 3 *Ired. Eq. R.* 236. *McKay v. Allen*, 6 *Yerg. R.* 45.)

But independent of statutory provision, the rule laid down in the case of *Yale v. Dederer* upon this subject, is the true doctrine, and will undoubtedly be ultimately recognized by all the American courts. The supreme court of the State of New York adheres so rigidly to the rule as to hold, that the subsequent promise of the married woman to pay the debt out of her separate estate, will not supply the defect of proof in the original contract. (*White v. Story, Administrator*, 43 *Barb. R.* 124.) And again, that the power of a married woman to charge her separate estate should not be extended beyond the rule laid down by the court of appeals in the case of *Yale v. Dederer*. (*Bellows v. Cawley*, 36 *Barb. R.* 52.) In a recent case in the supreme court of Wisconsin, Chief Justice Dixon, in delivering the opinion of the court, reviewed the cases bearing on the question, and approved of the ruling in *Yale v. Dederer*, reported in 18 *N. Y. R.* 265, but disapproved of the ruling in the case as reported in 22 *N. Y. R.* 450. (*Todd v. Lee*, 15 *Wis. R.* 365.)

And in a late case in the supreme court of Indiana, without ruling as to the extent of the power of a married woman over her separate estate by way of charging it with debts contracted by her, it was held, on the weight of authority in that state, that a court of equity will give execution against her separate estate, not only for debts created for the benefit of such estate, but for her own benefit in her support. (*Kantrowitz v. Prather*, 6 *Law Reg. [N. S.]* 602, 604. *Vide also Major v. Symmes*, 19 *Ind. R.* 117.) But the form in which the wife may bind her separate estate may depend upon the deed or instrument under which she holds it. (*Vide Hicks v. Johnston*, 24 *Geo. R.* 194. *Caldwell v. Savage*, 30 *Ala. R.* 283.)

§ 318. Judge Story says that the doctrines maintained by courts of equity, as to the nature and extent of the liability of the separate estate of a married woman for her debts and other charges

created during coverture, are somewhat artificial in their texture, and, therefore, require to be carefully distinguished from each other, as they cannot all be resolved into the general proposition, that she is, as to such property, to be deemed a *feme-sole*. In the first place, her separate property is not, in equity, liable for the payment of her general debts, or for her general personal engagements. So far, courts of equity follow the analogies of the common law. If, therefore, a married woman should, during her coverture, contract debts generally, without doing any act indicating an intention to charge her separate estate with the payment of them, courts of equity will not entertain any jurisdiction to enforce payment thereof out of such estate during her life.

But, in the second place, he says, her separate estate will, in equity, be held liable for all her debts, charges, incumbrances, and other engagements, which she does expressly, or by implication charge thereon; for, having the absolute power of disposing of the whole, she may, *a fortiori*, dispose of a part thereof. Her agreement, however, creating the charge, is not (it has been said), properly speaking, an obligatory contract, for, as a *feme-covert*, she is incapable of contracting; but is rather an appointment out of her separate estate. The power of appointment is incident to the power of enjoyment of her separate property; and every security thereon executed by her is to be deemed an appointment *pro tanto* of the separate estate. (2 *Story's Eq. Jur.* §§ 1398, 1399, and *vide authorities there cited*.)

§ 319. The courts have settled some general principles with respect to the rights of a married woman regarding her separate estate, which may be noted. These principles will be extracted from the authorities without any particular reference to the date of the decisions or the kindred nature of the rules which are established. A contract for a valuable consideration, by which a husband agrees to transfer certain property to his wife, although void at law, will be enforced in a court of equity. (*Jones v. Jones*, 18 *Md. R.* 468.)

That a husband has had the use of his wife's separate property for his own purposes, is a good consideration for his conveyance of land for the use of his wife. (*Hill v. West*, 8 *Ohio R.* 222.) Possession of money by a married woman is evidence, but not sufficient evidence, of her ownership of it, as against her husband's creditors. (*Caldwell v. Copeland*, 37 *Penn. R.* 430.)

Of course, the wife may sell her separate estate to pay the debts of her husband, unless she is restrained from doing so by the terms of the instrument under which she holds such separate estate. (*Block v. Galway*, 24 Penn. R. 18.)

A *feme-covert* can charge the whole, or a portion of her separate estate, as a surety for her husband, the intention to charge such separate estate being declared in the contract. And, although the instrument by which she promises to pay the debt of her husband, out of her separate estate declares that the consideration is for the benefit of her separate estate, instead of stating the real consideration, this will not vitiate the instrument or exempt the wife's separate estate, provided she expressly charges her separate estate in the instrument. (*Barnett v. Lichtenstein*, 39 Barb. R. 194.)

A married woman may employ counsel to procure a divorce for her from her husband, and when she does so she is liable to him for his compensation, and the same is a charge upon her separate estate. (*Oswalt v. Moore*, 19 Ark. R. 257.)

By an antenuptial agreement a woman gave to her future husband a sum of money, he agreeing to pay to her interest thereon during her life, the same as though she remained sole, and as if the money was her sole and separate property, and at her death he to be at liberty to dispose of both principal and interest without any reference to the agreement; the interest was regarded the husband's to dispose of by will. (*Mory v. Michael*, 18 Md. R. 227.)

When land was purchased for a married woman, as a homestead, with her separate means, and she went into possession and made valuable improvements thereon with her own separate funds, an arrangement between husband and wife in respect to such purchase, when there was no fraudulent intent, is lawful and will be sustained. And though, in such a case, the conveyance of the property was made, through mistake, to the husband instead of the wife, her equity is superior to that of a creditor of the husband whose debt matured and whose judgment was recovered after the title to the property had passed from the husband and wife by conveyance to *bona fide* creditors. (*Damon v. Hall*, 38 Barbour's R. 136.)

Whenever a husband has received or borrowed the property of his wife, under circumstances which in a court of equity would be regarded as creating a debt to her, from him, and as entitling her to be considered and treated as his creditor therefor, he will be

allowed to pay such debt from his property, in the same manner and upon the same principles, on which he would be allowed to pay any other debt to any other creditor; and a payment to her or a transfer of property to her, in consideration of such debt, will not be regarded as a gift, or a voluntary conveyance of property in fraud of his creditors. This is independent of any statutory provision. (*McCartney, Receiver, v. Welch*, 44 *Barb. R.* 271.)

So also when a husband is indebted to his wife in a certain sum, for money arising from the sale of her separate real estate, which sum she had lent to him, he agreeing to keep it for her, and treat it as her separate property, and repay it to her with interest, equity will hold the husband to be the trustee of his wife for that amount, and allow time to pay her the same, upon his becoming insolvent, in the same manner that he might pay any other creditor. But to authorize him to prefer his wife as a creditor, it is necessary that the money in his hands should be held and regarded as between them, at and from its receipt by him, as a loan from her; that he be deemed to be in fact a debtor to her for the same; and that they should have constantly and intentionally treated the same in his hands as her separate property. (*Woodworth v. Sweet*, 44 *Barb. R.* 268. *Danforth v. Woods*, 11 *Paige's Ch. R.* 9.)

§ 320. A *feme-covert* may, as respects her separate estate, become surety for her husband, and she is entitled as against him and his creditor, to all the rights as a surety. (*Neimcewicz v. Gahn*, 3 *Paige's Ch. R.* 614. 11 *Wend. R.* 312. *Vartie v. Underwood*, 18 *Barb. R.* 561.) So if the wife mortgages her property as security for the husband's debt, she is entitled in equity to have his interest in the land, as tenant by the curtesy initiate, first sold and applied to its extinguishment. (*Ib.*) And when the wife pledges her separate estate, or her reversionary interest in her real property, for the debt of her husband, she is entitled to the ordinary rights and privileges of a surety. (*Hawley v. Bradford*, 9 *Paige's Ch. R.* 200.)

Possession of the wife's separate property by the husband, if not inconsistent with the trust, is not fraudulent as against his creditors. (*Merritt v. Lyon*, 3 *Barb. R.* 110. *Vide also Bancow v. Kuhn*, 36 *Penn. R.* 383.)

When the wife gives a mortgage of her land as collateral to her husband's debt, the husband cannot pay it, and take a transfer in trust for himself; and a *bona fide* purchaser for value from the

trustee has no equity as against the wife. (*Fitch v. Cotheal*, 2 *Sand. Ch. R.* 29. And *vide Loomer v. Wheelwright*, 5 *ib.* 135.)

Where real estate of a wife, which is held subject to the marital rights of her husband, is sold, the proceeds of the sale, being money or personal property, belong to the husband; and, if the same is appropriated to the payment of an incumbrance upon the wife's separate estate, without the husband's assent, he has an equitable claim against the wife's separate estate for the money. (*Martin v. Martin*, 1 *Comst. R.* 473.)

§ 321. The creditor of the husband cannot subject the proceeds of the wife's separate estate to their claims against the husband. (*Gross v. Ransom*, 15 *Cal. R.* 322.)

Equity will not give any relief, out of the wife's separate estate, to the creditor of the husband, when the debt is not on account of the wife, but is the debt of the husband. (*Hatz's appeal*, 40 *Penn. R.* 209.) And an execution issued against the wife's separate estate in favor of the creditor of the husband will be restrained by injunction. (*Hunter's appeal*, 40 *Penn. R.* 194.)

But a *feme-covert* has a right to make a gift to her husband of the use and income of her separate estate, and, consequently, his creditors may attach such income or other property for which it has been exchanged; and acquiescence on the part of the wife in the husband's receipt of the profits of her estate, will be equivalent to a gift. (*Gage v. Dauchy*, 28 *Barb. R.* 622.)

A married woman, whose separate property has been sold under an execution against her husband, may come into equity for its recovery, when no trustee was created by the deed which created her separate estate. (*Cole v. Varner*, 31 *Ala. R.* 244.) The separate estate of the wife can be barred only by her, or by some one acting for her. (*Whitescarver v. Bonney*, 9 *Iowa R.* 480.) A mortgage given to a husband and wife for the wife's separate money, cannot be discharged by the husband alone. (*McKinney v. Hamilton*, 51 *Penn. R.* 63.)

A *feme-covert* may transmit her separate property to her husband through the medium of a trustee. (*Lewis v. Baldwin*, 11 *Ohio R.* 352. *Abbott v. Hurd*, 6 *Blackf. R.* 510.)

If a wife thinks fit or proper to keep up an establishment against the wishes of the husband, what is applied for the establishment will be a consideration for payments out of her estate on that account. That the proceeds of the settled funds having been

placed to the wife's account at her banker's, and applied principally to the current expenses of the establishment of the husband and herself, by the order and direction of the wife, the husband being the agent in their application as to moneys so applied, it was held there was a defective appointment which ought to be aided by the court. If the husband have not in any degree influenced the acts or conduct of the wife, there is no reason why her assets, including the trust funds which have become her assets, by the exercise of her power, should not be bound to the same extent as the assets of any other person, not under the disability of coverture, would be bound in the same circumstances.

The rights of married women may be barred, and their estates affected by active participation in breaches of trust, and if—their powers having been exercised by will—the trust funds become their assets, they must be liable for those breaches of trust, it would seem. But the fact that a married woman having permitted her husband to receive the trust funds, does not preclude a right to release by her or her appointee, for that would be to defeat the purpose for which the trust was created—the protection of the wife against the husband. (*Hughes v. Wells*, 9 *Hare's R.* 749. *S. C.* 41 *Eng. Ch. R.* 748.)

§ 322. In transactions between husband and wife relative to the separate estate of the wife, she, *prima facie*, will be viewed in the light of a *feme-sole*, and as such, as we have seen, she is competent to dispose of it to him, or for his use, subject to proof of fraud or undue influence on his part. (*Cruger v. Cruger*, 5 *Barb. R.* 225.) And whenever she gives it to her husband, or permits him to receive it, she will be precluded after his death of charging his estate with what he so received. (*Pawlet v. Delaval*, 2 *Ves. Sen. R.* 663. *Smith v. Camelford*, 2 *Ves. Jun. R.* 716. *Powell v. Hankey*, 2 *P. Wms. R.* 82. *Squires v. Dean*, 4 *Bro. C. C.* 326. *And vide Carter v. Anderson*, 3 *Sim. R.* 370. *Beresford v. Armagh*, 13 *ib.* 643. *Bartlett v. Gifford*, 3 *Russ. R.* 149.)

Upon the same principle, when the trustees, under the marriage settlement, had lent the wife's money to the husband with her consent, it was held that the husband was liable to account for only the principal. (*Ex parte Green*, 2 *Dea. & Chit. R.* 113.) But if no such consent be given, nor can be presumed, then the wife will be entitled to reimbursement out of her husband's estate for the whole of what he received of her separate property.

(*Parker v. Brooke*, 9 *Ves. R.* 583. *Vide Nettleship v. Nettleship*, 10 *Sim. R.* 236. *Attorney-General v. Paruther*, 3 *Bro. C. C.* 441.)

In some cases when the wife was entitled to the interest of the fund for life to her separate use, with a prescribed power to dispose of it, and upon her death the capital was given to her husband, on their filing a bill in chancery praying that the principal might be immediately paid to her husband, and the wife consenting to part with her life estate, the court has ordered the fund to be paid or transferred to the husband. (*Chesslyn v. Smith*, 8 *Ves. R.* 183. *Allen v. Papworth*, 1 *Ves. Sen. R.* 163.) But in later cases such a transfer has been refused, on the ground that the suit must be considered that of the husband, and the wife, for all the purposes of the suit, must be taken to be entirely under the influence of the husband. (*Simms v. Horwood*, 1 *Keene's R.* 7.)

It may, therefore, be considered as settled, that whether the wife's interest is such as she may dispose of independently of any special power, or she has merely a power to dispose of it, the court will not act upon a bill filed by her and her husband. (2 *Bright's Husband and Wife*, 265.)

The changes made by statute with respect to the wife's separate property, will be noticed hereafter.

CHAPTER XXIV.

ANTENUPTIAL CONTRACTS AND RULES RESPECTING THEM—POST-NUP-TIAL AGREEMENTS AND SETTLEMENTS—SEPARATE USES FOR FEMES-COVERT.

§ 323. THERE are certain rules with respect to the contract of husband and wife entered into before marriage, which were not noticed when treating of the wife's separate estate. These will now be referred to.

It appears to be a well settled principle of law, that all rights dependent on the nuptial contract are governed by the *lex loci contractus*, and when the parties marry with reference to the laws of a particular place or country as their future domicile, the law of that place or country is to govern in relation to their

right of property under the marriage. For example, when a contract of marriage executed in Paris between French citizens contained a clause by which the parties mutually give to each other and the survivor, all the estate and property acquired or purchased, or belonging to either at the time of his or her death, to be enjoyed by the survivor exclusively; and the husband afterward abandoned his wife and came to reside in New York, where he lived many years, and having acquired a large personal estate, died intestate, without lawful issue, leaving his wife living in France. The late court of chancery of the State of New York held that, under the law of France, by the antenuptial contract, the wife, as survivor, took all the estate to the exclusion of the husband's relatives, and the estate was decreed to the wife accordingly. (*Decouche v. Savetier*, 3 *Johns. Ch. R.* 190.)

So, when an antenuptial contract, made by two residents of the State of New York, with reference to removing to France, their native country, declared that they intended to marry under the law or legal rule of community; in giving effect to it here it was construed in reference to that rule as it existed in France when the marriage took place, though the parties had abandoned their intention and remained in the State of New York. (*Le Breton v. Miles*, 8 *Paige's Ch. R.* 261.) So, a marriage contract made by Prussians, in Prussia, was recognized by the surrogate of the city of New York, in construing a will made by the husband in this country. (*Schultz v. Darnebman*, 3 *Brad. R.* 379.)

So also a marriage contract made in France between citizens of that country, touching the succession to the personalty of the parties, was recognized and enforced here. (*Crosby v. Badger*, 3 *Edw. Ch. R.* 538.) It was, however, held by the late assistant vice-chancellor, Sandford, of the city of New York, that a marriage contract executed in France, whatever right it may confer there under the French laws, cannot operate as a mortgage of the husband's real estate situate in the State of New York, nor give the wife priority over other creditors of the husband in the administration of his estate. (*Ordronaux v. Rey*, 2 *Sand. Ch. R.* 33.)

In France, the rights of husband and wife with respect to their property may be defined and regulated by a contract between the parties before marriage; and there are two principles, either of which may be adopted in such a contract: First, a community of goods, which merges all the personal property of the wife, present

and future, and all the income of her real estate, into an eventual community of goods, of which the husband has the entire disposal, without liability to account to any one for the same. Second, the dotal system, which has a different effect, and aims at keeping separate the respective rights of the parties to such property as they owned before marriage, and especially to secure to the wife the exclusive control and enjoyment of her estate, principal and interest, unless surrendered to the husband by express stipulation. The parties may declare in general terms that they intend to marry under the principle of community of goods, or under the dotal system, which must be done in a specific clause in the contract. When this is done the intentions of the parties will be enforced in this country. (*Vail v. Vail*, 7 Barb. R. 226.)

The doctrine that the *lex loci contractus* shall control in cases of antenuptial contract is well settled, and will be recognized, unless the contract contains provisions contrary to the policy of the laws of the State wherein it is sought to be enforced. (*Scheforling v. Huffman*, 4 Ohio St. R. 241.)

§ 324. Marriage is a good consideration to sustain a contract made in contemplation of it, or as Chancellor Kent says: "Marriage has always been held to be the highest consideration in law." (*Strong v. Arden*, 1 John's Ch. R. 271.) And a contract made upon such consideration will be enforced in equity upon the application of any person within the scope of the consideration of the marriage. (2 *Story's Eq. Jur.* § 986.)

The mutual stipulations and grants of the parties to an antenuptial contract, in favor of each other, are alone sufficient to give validity to the provisions of the instrument.

When it was stipulated in an antenuptial contract executed in France, that, in case of the death of the wife without bearing children, her husband surviving, the real estate of which she should die possessed in the United States, should be immediately sold, and the proceeds remitted to her husband; this provision operated as a *grant* to the husband, contingent upon the death of the wife, to which effect was to be given upon the principle of equitable conversion. And if the antenuptial agreement fails to appoint a trustee to carry that object into effect, and the heirs at law are infants, a court of equity has power to appoint a trustee to sell such real estate and remit the powers to the husband (*De Barant v. Gott*, 6 Barb. R. 492.)

When the husband, after covenanting in the deed of settlement, to allow his wife to enjoy her separate property to her own use during the coverture, and that she might convey the same, and adding that he thereby released all his marital rights in and over the same, it was held that this release was to be construed in connection with the words immediately preceding and operated only as to his rights during coverture, and did not affect his rights as survivor of his wife. (*Stewart v. Stewart*, 7 *Johns. Ch. R.* 229.)

The general personal estate of a female infant is barred by a settlement made upon her marriage, because such personal estate becomes by the marriage the absolute property of the husband, and the settlement is in effect his settlement and not hers. (*Strong v. Wilkin*, 1 *Barb. Ch. R.* 8.)

§ 325. The intervention of a trustee in an antenuptial contract is not necessary to give the wife control of her separate estate. (*Strong v. Skinner*, 4 *Barb. R.* 546. *Abrams v. Whitmore*, 4 *Dessau. R.* 255.) And when by an antenuptial agreement the chattels of the woman are secured to her without the intervention of a trustee, equity will treat the husband as trustee, and hold him to account as such; but at law the title is in the husband, so that he alone can sue for the conversion of the property. (*Blanchard v. Blood*, 2 *Barb. R.* 352.)

It is the well settled doctrine of a court of equity, that if real or personal estate be settled on a married woman without the intervention of trustees, her interest will, notwithstanding, be protected by the conversion of the husband into a trustee; and this is the rule, though the settlement be made by an antenuptial agreement. (*Barkins v. Giles*, 1 *Rice's Eq. R.* 315.) And a marriage contract entered into before marriage is good without any parties thereto, except the intended husband and wife. (*Roane v. Hern*, 1 *Wash. R.* 47.) In one case in the State of South Carolina, where there were no trustees named in a marriage settlement, the court named trustees, although there was no necessity for such a proceeding provided there was no objection to the husband as a trustee. (*Barrett v. Barrett*, 4 *Dessau. R.* 448.)

When a female, in contemplation of marriage, conveys her real estate to a trustee, with an unlimited power to sell with her consent, or to pay such sums for her support and maintenance as she may require, upon her own receipt, free from the control of any husband she may have, and the residue, if any, for the benefit of

her children, the absolute power of disposal resides in her, and confers upon her an equitable fee, and renders the intended limitation over for the children void. (*Wright v. Miller*, 4 Barb. R. 600.)

If an antenuptial agreement, by which the husband agreed by will or otherwise to assure to the wife an annuity for life, and she to receive the same in satisfaction of all claim of his estate, be not performed by the husband, as when he leaves the annuity during her widowhood, instead of for life, the wife is not bound by the contract, and may claim her portion of the estate. (*Bliss v. Selden*, 7 Barb. R. 152. S. C. 8 N. Y. R. 31.)

When an antenuptial agreement gives the woman after marriage power "to enjoy, control, and dispose of her separate property in the same manner, and with the like effect as though she had continued a *feme-sole*," she has the power during coverture to dispose of the property by will. (*American Home Missionary Society v. Wadhams*, 10 Barb. R. 597.)

A reconveyance to a *cestui que trust* will be decreed after the termination of her coverture, when the plain intention of the settlement was to protect her against her husband. (*Fox v. Scott*, 3 Phila. R. 326.)

§ 326. In order to protect property against the claims of creditors by an agreement made in consideration of marriage, it is indispensable that the contract should be executed before marriage. (*Jones v. Henry*, 3 Litt. R. 427.)

In the State of Virginia, marriage settlements made in pursuance of antenuptial contracts, must be recorded within eight months after they are made, or they will be void as against prior creditors of the husband. (*Anderson v. Anderson*, 2 Call's R. 198.) And in the same state a contract in consideration of marriage, will be enforced upon acknowledgment before witnesses, although they were not present when it was made. (*Foster v. Foster*, 4 Call's R. 231.)

Unless a marriage settlement is required by statute to be recorded, it is valid without it. In South Carolina, as in Virginia, they have a statute requiring such settlements to be recorded, and hence in that state a marriage settlement not recorded within the time prescribed by statute, is void as to creditors, though the property was the wife's, and though it was recorded before the debt was contracted. The mere recording after the legal time is not sufficient notice to the creditor to set up the settlement against his

demand. (*Taylor v. Hericot*, 4 *Dessau. R.* 227. *Wilson v. Wilson*, 1 *ib.* 401.)

When a deed of marriage settlement is made before marriage, between an infant female and her guardian, the intended husband, and trustees, whereby her real estate is settled on her and her children, and the husband covenants that he will, whenever required, execute any and every further conveyance proper for more effectually settling and assuring the subject to the uses declared by deed; whether the infant is bound by the deed or not, the husband is bound by his covenant, and equity will not aid him to avoid it. (*Lee v. Stuart*, 2 *Leigh's R.* 76.)

Property conveyed by deed of marriage settlement, in trust, that the husband and wife shall be permitted, during their joint lives, to enjoy the profits, may be taken in execution to satisfy a debt incurred, after the marriage, for supplies furnished for the proper support of the husband and wife. (*Scott v. Lorine*, 6 *Munf. R.* 117.)

When, by a deed of settlement, in anticipation of marriage, the property of the wife was conveyed to a trustee, in trust for her use until the marriage, and after the marriage for her separate use, notwithstanding such coverture; and, after her death, for the use of such person or persons as she should, by will, notwithstanding such coverture, appoint; and, in default of such appointment, to the use of her heirs, and to the exclusion of the intended husband, either as tenant by the curtesy, or otherwise, so that the wife should not, at any time thereafter, either by herself or in conjunction with others, have the power of exonerating, releasing or discharging the property from the operation of her settlement, or of receiving any portion thereof, except the annual income thereof; by the operation of the rule in *Shelley's case*, the husband having died before the wife, the limitation of the equitable estate to the wife for life, with an unlimited power of appointing the inheritance by will, united itself with the equitable estate in remainder to her heirs generally, so as to create an equitable estate, in fee, in the whole property in the event that happened; and, having united this equitable fee with the legal estate, by a conveyance from the trustee, she was able to give a perfect title to the property. (*Mc Whorter v. Agnew*, 6 *Paige's Ch. R.* 111.)

§ 327. The rule in *Shelley's case*, so often referred to, was stated, on the authority of the Year Books, to be "that when the ancestor,

by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase." (*Shelley's case*, 1 *Coke's R.* 9.) In plain terms, the ancestor takes the whole estate, and the heirs, if they take at all, can take only by descent, contrary, it is admitted, to the natural meaning of the words and the clear intent of the grantor.

The definition of this rule, as given by Mr. Preston, and abridged by Chancellor Kent, is, "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation, by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the *heirs* entitles the ancestor to the whole estate." (1 *Preston on Estates*, 263-419. 4 *Kent's Com.* 215.)

The rule in *Shelley's case* occupies a very prominent place in the history of the law of real property, and it is quite interesting to understand it. The rule has been firmly established as an axiom in the English law of real property for five hundred years; and as to legal estates, it has had a prescriptive and uncontrollable authority, although the courts of equity have not always implicitly observed it in respect to limitations which do not include or carry the legal estate. (4 *Kent's Com.* 218.) For instance, if articles be entered into before marriage with a view to a future settlement, limiting real estates of the husband to the parents for their lives, and during the life of the survivor, remainder to the heirs of the body of the husband, the limitation to such heirs will be considered words of purchase, and a settlement directed accordingly; that is to say, after the life estates to the parents, to their son or sons in tail; on the ground that, if an estate tail were given by the settlement to the husband as directed by the articles, he alone might, immediately after the marriage, bar the issue and defeat a principal part of the settlement, the intended provision for the children of the marriage. In a word, the court will carry out the declared intention of the parties to the instrument in all cases of marriage settlements where it is possible consistently to do so. (*Trevor v. Trevor*, 1 *Ca. Abr.* 387. *Streatfield v. Streatfield*, *Forrest's Cases*,

176. *Honour v. Honour*, 2 Vern. R. 658. *Bale v. Coleman*, 1 P. Wms. R. 142. *Highway v. Benner*, 1 Bro. C. C. 584.)

The like rule prevails when the estate belongs to the wife, and the articles limit to her an estate in tail.

§ 328. But the rule in *Shelley's case* is now abolished by the statutes of several of the states, and, of course, is no longer applied to marriage settlements or other conveyances of real estate. Chancellor Kent said of it many years ago: "The judicial scholar, on whom his great master, Coke, has bestowed some portion of the gladsome light of jurisprudence, will scarcely be able to withhold an involuntary sigh as he casts a retrospective glance over the piles of learning devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in *Shelley's case*, which was so vehement and so protracted as to rouse the scepter of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful criticism and refined distinctions which pervade the various cases in law and equity, from those of Shelley and Archer down to the direct collision between the courts of law and equity in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in *Perrin v. Blake*, which awakened all that was noble and illustrious in talent and endowment through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and light paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgement of Cruise, and the severe and piercing criticisms of Reeve. What I have, therefore, written on this subject may be considered, so far as my native state is concerned, as an humble monument to the memory of departed learning." (4 Kent's Com. 233, note a.)

§ 329. Marriage articles are considered as the heads or minutes, only, of an agreement entered into between the parties upon consideration of the marriage, and being in their nature executory, they ought to be construed and molded in equity, according to the intention of the parties at the time of concluding them. (*Tabb v. Archer*, 3 Hen. & Munf. R. 319. *May v. May*, 7 Florida R. 207 *Adams v. Dickson*, 23 Geo. R. 406. Vide also *Tyson v.*

Tyson, 2 *Hawkes' R.* 472.) The intention of the parties to marriage articles is to be collected from the nature of the agreement, the language and context thereof, the usage in similar cases, and the legal rights of the parties, as they existed before, and would have existed after the marriage, if no such articles had been made; but, parol or other evidence, dehors the articles to explain or vary their meaning, ought not to be resorted to, unless there be some latent ambiguity which is otherwise impossible to be solved or explained; or unless something agreed on by the parties at the time has been omitted through fraud or accident.

An indorsement made on articles by the husband and wife subsequent to the marriage can neither be regarded as a part of the original contract nor as explanatory thereof.

Marriage articles are not to be rescinded after the marriage, even by consent of the husband and wife, or by any conveyance which they or either of them can make; but they will be enforced in equity at the suit of the issue of the parties, whether in *esse*, or in *ventre sa mere*, or of any other person for whose benefit the articles were intended. (*Tabb v. Archer*, 3 *Hen. & Munf. R.* 319.) In the last case cited, it was also held that infants may contract by marriage articles or settlements, and that such contracts will bind both parties when of full age. (*Vide also Lester v. Frasier*, 2 *Hill's Ch. R.* 537.)

But it was held by the assistant vice-chancellor in the State of New York, that the settlement by an infant female of her real estate, executed on the eve of her marriage, was voidable on her coming of age. Whether she could disaffirm the instrument during coverture, was regarded as a vexed question, though the preponderance of opinion was adverse to the power. But it was held that she could affirm it during coverture, after she come of full age, by a conveyance acknowledged by her pursuant to the statute. (*Temple v. Hawley*, 1 *Sand. Ch. R.* 153.) And in a late case in Pennsylvania, it was held, that the weight of authority inclines in favor of the right of a *feme-covert* to disaffirm her marriage settlement entered into while an infant, so far as the arrangement affects her real estate. (*Whichcote v. Lyle*, 28 *Penn. R.* 73.) And in the same case it was held that the husband is bound by articles of marriage settlement, although the wife was a minor when they were entered into. (*Vide also Wilson v. McCullough*, 19 *Penn. R.* 87.)

Contracts in consideration of marriage are greatly favored in equity; and between the parties themselves, and others falling

within the express objects of the contract, they will be enforced according to the obvious intent, however informally or irregularly they may have been executed, and that too although they may have been rendered inoperative at law by the marriage of the parties. (*Allen v. Rumph*, 2 *Hill's Ch. R.* 3.)

§ 330. A parol agreement made by a father in consideration of the marriage of his illegitimate daughter, to settle all his estate upon her husband, herself, and the issue of her marriage is binding, and although it does not attach specifically upon any portion of the father's property, so as to defeat a purchaser with notice, yet it will be enforced against volunteers claiming under him. For though the relation between the father and the illegitimate daughter is not a sufficient consideration to raise a use, yet the intervention of the husband extends to the wife and the issue. And the husband submitting, the estate was limited to him for life, with a power to make advancements upon the marriage or full age of the children, with remainder to the issue, as tenants in common, and cross remainders between them, upon their death under age and unmarried. (*Wall v. Scales*, 1 *Dev. Eq. R.* 472.)

In the State of North Carolina, antenuptial settlements are required to be registered, and when registered, an antenuptial settlement in articles, is, in equity, valid as a lien upon the property agreed to be settled against the general creditors of the debtor, and of course is valid against one claiming in the place of a creditor. (*Freeman v. Hill*, 1 *Dev. & Batt. R.* 389.)

When a husband by an antenuptial contract relinquishes and releases all claims by virtue of his marital rights, to the separate estate of his wife, the next of kin of the wife will be entitled to it. (*Henrico v. Laird*, 10 *Yerg. R.* 222.)

A settlement by a widow about to marry, of her interest in her former husband's estate, with the knowledge of her intended husband is valid. (*Latimer v. Elgin*, 4 *Dessau. R.* 26.)

Marriage, as has been before suggested, is not only a *bona fide* and valuable consideration, but the very highest consideration in law. A court of equity will, therefore, always support marriage settlements, if no particular evidence of fraud is made out, showing an intention to deceive or defraud creditors. For example, a man made a settlement before marriage, including his wife's fortune, and all his private property, the settlement was dictated by the uncle and guardian of the intended wife, who would not otherwise con-

sent to the marriage, and was ignorant of the insolvency of the intended husband, at the time. After the marriage, the creditors of the copartnership to which the husband belonged, filed a bill to set aside the settlement as respected his property as being fraudulent and void; but the court refused to set it aside. (*Tunno v. Trezevant*, 2 *Dessau. R.* 269.)

Though there be no express evidence of the delivery of an antenuptial agreement, and though it be found in the husband's possession after his death, its delivery will be presumed, if its due execution be proved, and it appears that it was recognized by the husband. (*Smith v. Moore*, 3 *Green's Ch. R.* 485.)

Courts will give effect to stipulations in marriage settlements and in other contracts of a similar nature, in favor of third persons for whose special use and benefit such stipulations were intended, although such third persons were not parties to the contract. (*King v. Whitley*, 10 *Paige's Ch. R.* 465. *Vide Bleeker v. Bingham*, 3 *ib.* 246. *Baird v. Bland*, 3 *Munf. R.* 570. *Coutts v. Greenhow*, 2 *ib.* 363.)

An antenuptial agreement to keep separate purses and manage the property of each for individual account, does not embrace a legacy afterward bequeathed to the wife. (*Boughn v. Miller*, *Wright's Ohio R.* 328.)

§ 331. When a marriage settlement does not conform to the intention of the parties, either through mistake or the fraud of one of the parties, it will be corrected by a court of equity. When, however, the correction interferes with the rights of the husband and wife, or issue of the marriage, it will be made with more caution than when it affects collaterals only, who are strangers to the consideration of the deed.

A marriage settlement which does not conform to the intention of the wife, will not be annulled, so as to leave the property subject to the legal rights of the husband; but it will be reformed by inserting the omitted provision upon the same principles on which articles are executed; and upon the articles being reformed, collaterals who claim under a settlement procured by the fraud of the father are excluded from any benefit under it. (*Scott v. Duncan*, 4 *Dev. Eq. R.* 403.)

A gross error in a marriage settlement, which was caused by an interlineation made by the husband, was rectified by the court, and the deed was made to speak its original language. (*Garner v.*

Garner, 1 *Dessau. R.* 437.) But the person who drew a marriage settlement and swears that it was drawn in conformity to his instructions, will not be permitted to prove that the object or intention of the deed is different from that which appears on its face; there being no allegation of fraud. (*Dupree v. McDonald*, 4 *Dessau. R.* 209.)

When a husband on marriage imposed on his wife by giving her a bond void at law, equity established the agreement according to the intent of the parties. (*Watkins v. Watkins*, 2 *Atk. R.* 96.)

Two parties being infants and contemplating a marriage, the intended wife being possessed of a large amount of United States stock, a few days before her marriage transferred the entire legal estate therein to trustees, who were to permit her to receive during life the dividends and profits of the stock. She reserved no power over the principal except the *jus disponendi* by last will and testament to take effect in case she died, without leaving a child or descendant. After the marriage of the parties and they had attained their full age, a bill was filed by them against the trustees praying a modification of the trust by having a part of the trust fund invested under the direction of the husband in the purchase of a farm; it was held, that whether the deed of transfer was valid or fraudulent, the court could not change the trust; that if valid it had given the parties no control over the principal fund, and a court of equity did not possess any power to change and modify trusts so contrary to the manifest intention of the deeds creating them; or if a fraud on the rights of the intended husband, though the court might set the deed aside, yet it could make no terms with a fraudulent instrument. (*Lowry v. Tierman*, 2 *Harr. & Gill. R.* 34.)

When a lady married before she attained twenty-one, and by her marriage articles she and her husband covenanted to assign a trust fund, in which she had a reversionary interest, to trustees in trust for her and her husband and the children of their marriage, a bill for a specific performance of the articles filed by the children against their father and mother, after the mother's interest had become an interest in possession, but whilst the fund remained outstanding, cannot be sustained. The fact that the property has not been reduced to the possession of the husband, in such a case, prevents the articles from binding him. Whether he might not be liable in respect of such interest in the property as he might ulti-

mately acquire is another question. But so long as the fund remains outstanding, a bill cannot be sustained against the husband. (*Berton v. Berton*, 16 *Sim. R.* 552. *S. C.* 39 *Eng. Ch. R.* 551 *Ellison v. Ellison*, 36 *Eng. Ch. R.* 308.)

It is the province of a court of equity to decree the specific execution of marriage articles, when the apparent intention of the parties will direct the decree, without a strict scanning of the articles according to nice grammatical rules, or the technical meaning of words. (*Roane v. Hern*, 1 *Wash. R.* 47.)

It is a general rule that the husband is precluded from disturbing an antenuptial settlement, or even aiding the wife in setting it aside when voidable as to her; but if it clearly appear that the husband executed the deed in ignorance of the fact that his intended wife was not a party to it, and that it did not affect her real estate, and his covenants and conveyance were, therefore, made under a mistake; and, further, that the dispositions of the settlement were highly injurious, the court, in view of the fact of the entire failure of the consideration, of the complainant's grant and covenants as to the real estate, in connection with other facts, will hold that the husband is not bound by the deed, and upon the submission of the parties, a new settlement will be decreed, with proper guards for the parties. (*Temple v. Hawley*, 1 *Sand. Ch. R.* 153.)

§ 332. The law is well settled, that a provision made for the wife in contemplation of marriage, which, by the terms of it, is not to take effect until after the death of the husband, is not extinguished by the subsequent marriage. (*Gage v. Acton*, 1 *Salk. R.* 325. *Gibson v. Gibson*, 15 *Mass. R.* 106, 111.)

So, contracts by the husband with the wife previous to marriage, containing duties not to be performed until after the dissolution of the coverture, which were entered into with a view of providing for the wife, or his issue by her, are binding upon him, both in law and equity; and in every case, when the agreement is fair, and in accordance with the spirit and policy of the law, equity will enforce its specific performance. (*West v. West*, 10 *Serg. & Rawle's R.* 447.) And equity will compel a specific performance of an antenuptial agreement, at the request of any person coming within the influence of the marriage consideration in favor of collateral relations, and all who rest their claims upon a valuable consideration. (*Pulvertaft v. Pulvertaft*, 18 *Ves. R.* 92. *Bradish*

v. *Gibbs*, 3 *Johns. Ch. R.* 550.) In fact, a contract made in contemplation of the marriage of the parties, respecting the property of either, to be performed after marriage, may be enforced in equity. (*Miller v. Goodwin*, 8 *Gray's R.* 542.)

A promise made by an intended husband before marriage not to take the wife away from the immediate neighborhood of her mother without her consent, is not legally binding upon the husband. (*Hair v. Hair*, 10 *Rich. Eq. R.* 163.)

Antenuptial agreements, being peculiarly liable to misapprehension and misrepresentation, will not be enforced in the courts, unless they are entirely satisfied that such agreements were made. (*Montgomery v. Henderson*, 3 *Jones' Eq. R.* 113.)

An antenuptial settlement not evidenced by deed, but resting in the husband's written covenant, if final and clear and complete, and there is nothing else to prevent, will be enforced in a court of equity for the benefit of the wife, if she so elect, or she may disregard it, and claim her right of dower and distribution. (*Woodward v. Woodward*, 5 *Sneed's R.* 49.)

A bond given by the husband to his intended wife, to be paid to her by his executors after his death, is not avoided by the marriage, but is recoverable at law. This doctrine is well sustained in a case in the English courts, in which Lord Kenyon observed that he readily acceded to the general proposition that a person, by marrying his creditor, releases the debts of his wife, but lamented that Lord Holt should (in *Ld. Raymond*) have had recourse to such flimsy and technical arguments to enforce a case so directly against law and conscience as that a man could not bind his property in favor of his wife, and could not make it liable to the payment of a bond executed before marriage. No case is probably to be found in the modern decisions of sufficient authority to overthrow the reasoning of Lord Kenyon in the case referred to, and the doctrine of the case may now be relied on as good law. (*Melbourne v. Ewart*, 5 *Term R.* 381. *Reeves' Dom. Rel.* 169, note 1.)

But there can be no doubt at all, that a bond given to the wife by the husband before marriage, the condition of which is to make a settlement on her, will be enforced by a court of equity. Such a bond is sufficient evidence of an agreement to make a settlement, and it will therefore be specifically enforced.

§ 333. It is well settled upon principle and authority, that to make an antenuptial agreement void as a fraud upon creditors, it

is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud, and the other party had no notice of it, but is innocent of it, she is not and cannot be affected by it. As has been before suggested, marriage, in contemplation of the law, is not only a valuable consideration to support an antenuptial settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with a strong resolution. The husband and wife, parties to such contract, are, therefore, deemed in the highest sense, purchasers for a valuable consideration; and so, that it is *bona fide*, and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors.

A contract, in consideration of a future marriage, is of that nature which creates a legal and equitable obligation on the parties to perform it—good faith, according to its stipulations. The consideration is good and valuable in contemplation of the law, as if it was made on the loan or payment of money. If the contract is excluded, the parties become purchasers; if it remains executory till after the marriage, they become creditors on its consummation, or assume *pro tanto* the character and acquire the rights of both, if executed only in part. They are entitled to the protection of all courts in the enjoyment of what is granted, and to their aid in enforcing the performance of what has been stipulated to be done, and when either party can rightfully call on a court of law or equity to compel the other to perform an act necessary to the execution of the contract, and the judgment or decree of the court would be given in his favor, a voluntary performance of the legal or equitable obligation would be equally valid. The consideration being valuable if the contract, whether executed or executory, is made in good faith with one having no notice or knowledge of any fraud, covin or collusion to defraud creditors, performance may be enforced or voluntarily made, and the contract carried into execution at any time, either in whole or in part, as is in the power of the party; and whatever is so done, will be as valid and binding, between the parties and in relation to third persons, as if the execution had been completed on its date. The law is express in referring to the time of the conveyance and assurance, and embraces not only perfect grants or gifts, but any estate or interest in lands, goods and chattels made, conveyed or assured. (*Vide Maguire v. Thompson*, 7 *Peters' R.* 348.)

§ 334. The decisions with respect to post-nuptial agreements are very numerous, and not always harmonious. It may be affirmed, however, as a general principle, that a post-nuptial agreement between husband and wife, fairly entered into, and untainted with fraud, by which property is set apart for the separate use of the wife, will be sustained in equity as a valid transaction. It depends, very much, to be sure as to the objects of the settlement in regard to the future relations of the parties, but there is no doubt that a post-nuptial agreement between husband and wife, made upon a legal and sufficient consideration, will be enforced. When the agreement contemplates the continued cohabitation of the parties, the courts are always disposed to uphold it, provided no technical or substantial principle of law intervenes. But when the post-nuptial agreement contemplates a separation of the parties, there is always some question. Indeed, it has sometimes been questioned whether such an agreement ought not to be held utterly void, to all intents and purposes, as against the policy of the law, and many very respectable authorities have gone to this extent. But generally, however, the authorities upon the subject do not adopt this broad principle, whatever may be thought of the policy or venality of a provision for such a separation.

§ 335. With respect to stipulations for a separate maintenance of the wife apart from her husband, Lord Stowell said: "The law has said, that married persons shall not be *legally* separated, upon the mere disinclination of one or both to cohabit together; the disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case. To vindicate the policy of the law is no necessary part of the office of a judge; but, if it were, it would not be difficult to show that the law, in this respect, has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though, in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands, and

good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that, upon mutual disgust, married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring, and to the usual order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of estrangement from their common offspring, and in a state of the most licentious and unreserved criminality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good." (*Evans v. Evans*, 1 *Haggard's Consistory R.* 36.)

§ 336. In another case where the subject was elaborately discussed, Lord Eldon expressed himself thus: "According to the law of this country, marriage is an indissoluble contract. It can only be dissolved *a vinculo matrimonii* by the legislature; and that contract, once entered into, imposes upon the husband and wife, both with respect to themselves and with respect to their offspring, most important and most sacred duties; so important and so sacred, that it does seem a little astonishing, that it ever should have happened, that it should be thought that they could, by a mutual agreement between themselves, destroy all the duties they owed to each other, and all the duties they owed to their offspring. I do not go through what has been stated in a great variety of cases upon the subject, nor do I refer to them for any other purpose than that of stating that which I think can admit of no contradiction, that it is impossible for any person to read the judgments I have had the honor to pronounce upon the subject, without seeing that I never could, originally, have been a party to any such doctrine. But, when decision followed decision; when men whose professional knowledge, whose talents, and whose abilities I was bound not only to respect, but to revere, had so often in courts of law stated doctrines to which I could not agree, it seemed to me a most improper thing, that I should take upon myself to say, that these doctrines were wrong; and I believe it will be found, if your lordships look at the judgment to which I am referring, that I was always exceedingly anxious that a case of this important nature should be brought before the House of Lords." (*Westmeath v. Salisbury*, 5 *Bligh's [N. S.] R.* 339.)

§ 337. Judge Story says: "The principal distinctions on this subject, as they are now established, seem to be as follows: In the first place, a deed of separation does not relieve the wife from any of the ordinary disabilities of coverture. In the next place, a deed of separation entered into by the husband and wife alone, without the intervention of trustees, is utterly void. In the next place, a deed for an immediate separation, with the intervention of trustees, will not be enforced, so far as it regards any covenant of separation, but only so far as maintenance is covenanted for by the husband, and the trustees covenant to exonerate him from any debts contracted therefor. In the next place, if a deed of separation contains a covenant purporting to preclude the parties from any future suits for the restitution of conjugal rights, the covenant will be utterly void. In the next place, a deed containing a covenant with trustees for a future separation of the husband and wife, and for her maintenance consequent thereon, will be utterly void. In the next place, even in case of a deed for an immediate separation, if the parties come together again, there is an end to it with respect to any future as well as to the last separation." (2 *Story's Eq. Jur.* § 1428.)

§ 338. The doctrine of the authorities upon the subject, somewhat indiscriminately given, are: Articles of separation, when there is a trustee with whom the husband covenanted for the separate maintenance of the wife, will be valid, although the wife herself covenanted not to molest the husband, and to indemnify him against her debts. (*Brown v. Clark*, 1 *Phila. R.* 561.)

A post-nuptial agreement between husband and wife, made in view of a voluntary separation, which is fair and reasonable, will be upheld in equity. (*Miller v. Miller*, 16 *Ohio St. R.* 527. *Wells v. Street*, 9 *Cal. R.* 439.)

Articles of separation between husband and wife, through the medium of a trustee, for the separate support of the wife, are not void as against public policy. (*Butler v. Wilson*, 14 *Ohio R.* 257. *Vide Schindell v. Schindell*, 12 *Md. R.* 294.) But the court will not enforce a contract between husband and wife to live separate. (*Mansfield v. Mansfield*, *Wright's [Ohio] R.* 284.)

A deed of gift of chattels from the husband to the wife, without the intervention of a trustee, upon an agreement to live separate, will be no bar to an action at law by the husband for the recovery of the property. (*Towney v. Sinclair*, 3 *How. [Miss.] R.* 324.)

A post-nuptial agreement, by which the husband and wife agree to live apart, and the husband conveys one-third of his estate to trustees, for the sole use and support of the wife, the trustees covenanteeing that the wife shall not claim any other portion of the estate, will not bar the wife of her dower and distributive share in her husband's estate. But the wife cannot hold the property conveyed by the deed, and also be entitled to dower and distribution, and if she files her bill for dower and distribution, it will be considered that she elects to take the latter. (*Watkins v. Watkins*, 7 *Yerg. R.* 283.)

A deed of separation between husband and wife, without consideration, is void at law between the parties thereto, and it is of no effect, even in equity, as against the assignees of the husband. The wife's covenant in such articles cannot form the consideration for the execution of the deed on the part of the husband. (*Cropsey v. McKinney*, 30 *Barb. R.* 47.) An indenture entered into in contemplation of, and as an inducement to, a future separation between husband and wife, is void. (*Florentine v. Wilson, Lalor's Hill & Denio's R.* 303.) A trust created by a husband, for the support and maintenance of his wife, who has left him in consequence of alleged ill-treatment, and is living separate and apart from him, is a valid trust, and will uphold a mortgage given by the husband to a trustee, to recover the payment of a specified sum annually for the wife's support. (*Calkins v. Long*, 22 *Barb. R.* 97.) And in this case it was substantially held that when husband and wife agree to separate, a stipulation on the part of the husband to pay a specified sum annually, for the separate maintenance and support of the wife, is valid, and may be enforced. This doctrine is laid down as the sequence of the well settled rule, that the husband is bound to support his wife, and the relation of husband and wife is *ipso facto* a letter of credit to the wife for necessities suitable and proper to the sphere in which she moves, and that if the husband and wife part by consent, and he secures to her a separate maintenance, suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable, even for necessities; while, if they separate without any provision being made for the wife's maintenance, the husband is liable for necessities furnished her suitable to his condition in life.

§ 339. Judge Reeve says that articles of agreement entered into between husband and wife to live separately are recognized both

in the courts of law and equity; and that the parties are bound by all the legal covenants entered into, and those marital rights which the husband, in such articles, renounces, he can never resume. And, in a learned note to the third edition of Judge Reeve's work on the domestic relations, it is said: "The question whether an agreement made between husband and wife, during coverture, to her separately, is valid in law, has been a subject of much discussion in the English courts of law and chancery. It was formerly held that such an agreement was void, and so Lord Eldon intimated in the case of *St. John v. St. John* (11 *Ves. R.* 530). His lordship placed it upon the ground that it was against the policy of the law, and, consequently, void, inasmuch as such settlements, creating a separate maintenance, by a mere voluntary agreement between husband and wife, were, in their consequences, destructive to the indissoluble nature of the marriage contract; and treated it as one of the most serious questions that could be discussed in a court of justice. In *Worrall v. Jacob* (3 *Merrivale's R.* 256), it was considered as settled that chancery would not carry into execution such articles between husband and wife; though it was admitted that an engagement between the husband and a third person, as a trustee, though originating out of, and having reference to, a separation, was valid, and would be so considered in chancery. The reason of this decision was said to be that, if such agreements were enforced, it would give the parties the power to alter the duties growing out of, and the effect of, the marriage contract, and to effect, at their pleasure, a partial dissolution of it. There seems to be no reason why the mere introduction of a trustee should be sufficient to enforce the agreement in chancery. It certainly makes no difference with the effect of the contract. If, as having a tendency to the dissolution of the marriage contract, it is against the policy of the law in the one case, it most clearly is in the other. It is not now necessary to seek for the reason of this anomaly, for the balance of authorities, both in England and the United States, are in favor of sustaining such an agreement, with or without a trustee. (*Carson v. Merry*, 3 *Paige's Ch. R.* 483. *Reed v. Beazely*, 1 *Blackf. [Ind.] R.* 97. [See the high compliment to the authority of the latter case, in note, 2 *Kent's Com.* 176.] *Ross v. Willoughby*, 10 *Price's R.* 2. 2 *Raithby's Vernon*, 386, in note. *Rodney v. Chambers*, 2 *East. R.* 383. *Cooke v. Wiggins*, 10 *Ves. R.* 191.) But the introduction of the fiction of a trustee places

the agreement valid, both in law and chancery. (2 *Kent's Com.* 177. *Vide Nurse v. Craig*, 5 *Bos. & Pul.* 148. *Hindley v. Westmeath*, 6 *Barn. & Cress. R.* 100. *Shelthar v. Gregory*, 2 *Wend. R.* 422.)

"The course of decisions upon the effect of such agreements has been very uniform in the United States. (*Randall v. Murgatroyd*, 4 *Dall. R.* 304, 307. *Browning v. Coppage*, 3 *Bibb's R.* 37. *Crost-waight v. Hulkinson*, 2 *ib.* 497. *Maguire v. Thompson*, 1 *Baldwin's C. C. [U. S.] R.* 344. *Scott v. Loraine*, 6 *Munf. R.* 117. *Bray v. Dudgeon*, *ib.* 132. *Tyson v. Tyson*, 2 *Hawkes' R.* 472.) But in Connecticut the decisions are different, and seem rather to follow the course pointed out by Lord Eldon in *St. John v. St. John*.* In *Debble v. Hutton* (1 *Day's R.* 221), it was held that an agreement between husband and wife, during coverture, could not be engrossed in chancery; but in another, with the assistance of a trustee, it was held to be binding." (*Nicholas v. Palmer*, 5 *Day's R.* 47. *Reeve's Dom. Rel.* [3d ed.] 174, note 1.)

The learned annotators do not express a decided opinion upon the subject for themselves, but the weight of authority favors the doctrine that these provisions for the separate maintenance of the wife, when the separation has actually taken place, are valid, and will be enforced by the courts. So that, although the courts will not, in direct terms, decree a separation between husband and wife, yet they will do so indirectly by compelling the husband to perform his agreement to pay separate maintenance. Still, the courts will invariably decline to do any thing which may tend to the continuance of a division between husband and wife, under their mutual agreement to live apart, when the husband has placed himself under no legal or equitable obligation to allow separate maintenance.

§ 340. It is usual in these post-nuptial agreements providing for the separate maintenance of the wife, that a trustee of the wife is made the medium of the parties, who becomes responsible to the husband that he shall not be made liable for his wife's debts; and yet there are instances where the contract is between the husband and a third person acting for the wife, and no indemnity is given to the husband against his liability to pay such debts. Upon this subject the cases show that the wife has precisely the same rights as any other *cestui que trust* to call for the execution of the trust created in her favor. So, whether the deed of separation securing

to her maintenance be purely voluntary, or be supported by a valuable consideration, as the covenant of her trustee to indemnify the husband against her debts, she will be entitled in either case to call for an execution of the trust. (*Vide Turner v. Warwick, Finch's Ch. Ca. 73. Fitzer v. Fitzer, 2 Atk. R. 511. Clough v. Lambert, 10 Sim. R. 174.*) This, of course, is upon the assumption that the rights of creditors and purchasers are not involved. In order that the settlement be valid as to the creditors of the husband and purchasers in good faith, it is necessary that it be made for valuable considerations.

Upon the death of the wife, separated from her husband upon a post-nuptial settlement, the allowance will be apportioned between the last and accruing times of payment. (*Howell v. Hanforth, 2 Blackst. R. 843.*)

§ 341. The question as to the wife's power of absolutely disposing of the funds settled upon her by her husband, in consequence of their mutual agreement to live separate, does not appear to be definitely settled. Some judges have held to the opinion that the allowance being made for the wife's maintenance, she cannot alien it by anticipation. While others contend that, the wife being a *feme-sole* in regard to this provision, there is no ordinary distinction between such a case and the one of a limitation of property to the wife's separate use; so that the *jus disponendi* applies to each indiscriminately. Lord Alvanly, Master of the Rolls, said that such an allowance was not property to which the wife was entitled to her sole and separate use; that there was a special trust upon it; that she had no dominion over it, and any attempted disposition of it by her could not be enforced in a court of equity. (*Hyde v. Price, 3 Ves. R. 487.*)

On the contrary, Mr. Roper expresses the opinion, that when the property is so settled by the husband upon separation as to vest it in the wife for her separate use, consistency requires that she should have the same powers of disposition over it as over funds given to her in the like form of settlement by any other person. (*Roper on Husband and Wife, 304.*)

In a late case, Lord Alvinger, C. B., though strongly in favor of the doctrine that separate estates created by deeds of separation ought not to be made the subject of charge by the wife, said that he could not act upon it, however just he might deem it, after the cases had gone to so great a length in giving effect to deeds of

separation. (*Palmer v. Fraser*, 3 *You. & Coll. Eq. Ex. R.* 499.) After all, the question of the wife's power over such funds depends upon the terms of the instrument securing the allowance. However, the intent of the provision made for the wife upon separation being to enable her to procure necessities, it follows that the application of it to those purposes, whatever the terms of the settlement, is a legitimate appropriation of the property.

§ 342. It has sometimes been intimated that the same rule of necessity existed that the wife should manifest an intention to charge her separate maintenance with the debts of particular creditors, as was considered to exist, to entitle her creditors to claim upon her separate estate when not settled upon her for support and maintenance upon separation. Mr. Roper, however, observes that there appears to be a wide difference in principle between the two cases; for where the property is limited to the wife's separate use, and she cohabits with her husband, the creditor has the husband's security for necessities; it is but just, therefore, to require some evidence of an agreement between her and her creditor that her separate estate should be applied in satisfaction of his demand. But that when the creditor is deprived of the husband's security, by the allowance to the wife of a yearly sum for maintenance upon separation, *i. e.* for the express purpose of discharging her necessary debts, it seems but reasonable that a court of equity should consider this to be such an appropriation of the fund for those demands, as to entitle her separate creditors to maintain a suit in equity to subject it in the hands of her trustees, to the satisfaction of her debts. (2 *Roper on Husband and Wife*, 305.) And in a case of separation before Lord Thurlow, he expressed himself upon the subject thus: "Upon the question whether a creditor has a right against the separate estate of the wife and against the husband as allowing it to her, my opinion is, that *prima facie* a creditor has such right." (*Lilia v. Airey*, 1 *Ves. Jun. R.* 277.) Undoubtedly, when the wife's intention appears or is inferred to charge her separate maintenance with a debt for necessities, it will entitle the creditor to a satisfaction of his debt out of the fund provided for such maintenance. (*Stuart v. Rickwell*, 3 *Mad. R.* 387. *Murray v. Barler*, 3 *Mylne & Keen's R.* 209.) Judge Selden, late of the New York court of appeals, seems to be of the opinion that there is no difference between the case of separate maintenance and an ordinary one of a separate estate, with respect to the power of the

wife to charge it. (*Yale v. Dederer*, 22 *N. Y. R.* 450, 454.) While Judge Harris, sitting in the same court, evidently places much reliance upon the circumstance that the wife is living apart from her husband when she attempts to charge her estate. (*Yale v. Dederer*, 18 *N. Y. R.* 265, 280.)

§ 343. What will determine a separate maintenance secured to the wife by agreement of the husband, is not always an easy matter to determine. Upon principle it would seem that the separate maintenance being founded upon express contract between the parties, or between the husband and the friends of the wife, it would require the same mutual agreement to dissolve as to make the contract. But this would depend much upon the terms of the separation. If the separation be intended to be permanent, that is during the lives of the parties; or if the agreement for separation be until both agree to live together again, the wife's consent to put an end to the allowance of separate maintenance is necessary, and the offer of the husband to take the wife back again and cohabit with her, will not have the effect to put an end to such contract. But if the agreement for separation be merely temporary, or for an uncertain period, then the husband's offer to take back his wife and maintain her, if not artfully and insincerely made, will, without regard to her refusal to return, put an end to the agreement, and a court of equity will not enforce the payment of the separate allowance to the wife. Such seems to be the doctrine of the authorities, both English and American. (*Guth v. Guth*, 3 *Brown's C. C.* 614. *Hoare v. Hoare*, 2 *Ridgway's Parl. Ca.* 268. *Gawder v. Draper*, 2 *Vent. R.* 217. *Head v. Head*, 3 *Atk. R.* 547. *Calkins v. Long*, 22 *Barb. R.* 97.) Reconciliation and recohobitation will avoid a deed of separation, but the husband may, nevertheless, so conduct himself afterward as to contract a new obligation on the footing of the separation deed. (*Webster v. Webster*, 17 *English Law and Equity R.* 278. *Vide Pidgin v. Cram*, 8 *N. H. R.* 350.) However, in such a case, when the wife returns for the purpose of resuming her duties and privileges as a married woman, and is received by her husband, the previous agreement to live separate from each other is at an end, and the bond given for the separate maintenance falls with it; and the subsequent abandonment of the husband by the wife does not revive the bond or the legal liability of the husband to afford her a separate maintenance. (*Shelthar v.*

Gregory, 2 *Wendell's R.* 422. And vide *Wells v. Stout*, 9 *Cal. R.* 479.)

If a third person covenant, for a valuable consideration moving from the husband, to pay to the wife a separate maintenance, who was then living apart from her husband by mutual agreement, it seems that the offer of such person to take her to his house will not exempt him from her demand for the separate allowance, because the law imposes upon her no obligation to reside with such person; besides, if such a residence were accepted by her, it would have no effect in promoting a reconciliation between her and her husband, which is the object the law has in view in withholding the maintenance when it is proper to do so. (*Dutton v. Dutton*, 4 *Vin. Abr.* 178.)

It has been held that the crime of adultery on the part of the wife will not incapacitate her from compelling her husband to pay her separate maintenance, because at common law that did not affect her right to prosecute her civil actions. (*Vide Seagrave v. Seagrave*, 13 *Ves. R.* 439. *Jee v. Thurlow*, 2 *Barn. & Cress. R.* 551. *S. C.* 9 *Eng. C. L. R.* 174. *Field v. Sims*, 4 *Bos. & Pul. R.* 121.) In one case, however, the court seemed to doubt whether such an act would not determine the allowance to the wife. (*Scholey v. Goodman*, 8 *Eng. C. L. R.* 342.) But the case of *Seagrave v. Seagrave* was not cited, and the court designedly abstained from expressing a decided opinion upon the subject, although the turn which the case took would indicate that the judges were undecided upon the question. Since that, however, the case of *Jee v. Thurlow* has been decided, and the weight of authority is clear that the adultery of the wife will not ordinarily avoid the allowance, particularly when the covenant is founded upon the engagements of a trustee to indemnify the husband against the support of the wife, on the ground that if the husband, when executing his deed of settlement, thinks proper to make the non-commission of adultery, or any thing else, a condition of paying the annuity to his wife, he should have covenanted to pay it *quamdin cas ta vixerit*—that is, as long as she might have lived chaste or virtuous.

§ 344. When husband and wife enter into covenants to live separately, the husband renounces his marital rights to the person of his wife. Of course, she is then entitled to all acquisitions of property which may arise from her personal services; and it has been said that the husband can never recover any thing of the man who

should take away his wife so separated, or maintain a suit against any man for criminal conversation with her. This latter doctrine, however, is not without contradictory authorities. Mr. Roper lays down the rule that the wife, after a separation, retains the character of a married woman, and that the husband may recover damages for adultery committed by the wife while living apart from him though the adultery does not cause any forfeiture of the provisions under the deed of settlement; and Chancellor Kent, it seems, entertained the same opinion. (2 *Roper on Husband and Wife*, by Jacob, 301-322. 2 *Kent's Com.* 177, note b.)

But Judge Reeve states the doctrine, unreservedly, that the husband, while living apart from his wife under a post-nuptial agreement, cannot maintain an action against any man for criminal conversation with his wife, or for taking her away. (*Reeve's Dom. Rel.* 92.)

Lord Kenyon once ruled at *nisi prius*, that an action for the adultery of the wife was founded on the injury which the husband has sustained in the deprivation of the comfort, society and assistance of his wife, and therefore, when the husband voluntarily relinquishes the comfort, society and assistance of his wife by consenting to a separation from her, he can suffer no loss from her, incontinency while such separation continues; and his opinion was afterward confirmed by the court of king's bench upon a motion for a new trial. (*Weedon v. Timbrell*, 5 *Term R.* 357.)

Lord Ellenborough laid down the proposition, and the court of king's bench affirmed it, that the surrender by the husband of his marital rights to the comfort, society and assistance of his wife, under the instrument of separation must be complete and absolute; so that, if the husband reserve his wife's assistance for the benefit of their infant children, and she is to have liberty to visit his house as often as she pleases, to afford them all necessary care and attention, in such and the like instances the husband may maintain an action for criminal intercourse with her during the separation, upon the principle that he had not, in fact, wholly parted with the comfort, society and assistance of his wife; and, at the same time, his lordship intimated that the decision of *Weedon v. Timbrell* was not good law to the extent there decided. (*Chambers v. Caulfield*, 6 *East's R.* 245.)

Perhaps the point may be regarded as unsettled, and yet the better opinion is that, notwithstanding the agreement of separa-

tion, the relation of husband and wife, and the rights arising out of that relation, must be considered as subsisting for all legal purposes; and, therefore, that a separation will not deprive the husband of the legal right of maintaining his action for criminal conversation with his wife, whatever effect it may have upon the amount of damages. (*Vide Marshall v. Rutton*, 8 Term R. 548. *Winter v. Henn*, 19 Eng. C. L. R. 491. *Harvey v. Watson*, 7 Man. & Gran. R. 644.)

It should be remarked that the wife who lives separate and apart from her husband is wholly freed and discharged from all government and restraint on the part of the husband. Should he attempt to seize her person, and compel her to cohabit with him, she would be set at liberty on *habeas corpus*, and the husband might be punished criminally, as for a breach of the peace, or an assault and battery. The contract by the husband to permit his wife to live apart from him is a formal renunciation of the marital right to seize her person, and hence the remedy which the law provides in case he violate his engagement. (*Vide Rex v. Lester*, 1 Strange's R. 478. *Rem v. Clarkson*, 2 ib. 444. *Rex v. Mead*, 1 Burr. R. 542. *The King v. Winton*, 5 Term R. 89.) Nor is the husband justified in entering the house of a third person to reclaim his wife, when he has allowed her, by a separation deed, to live where she pleases. (*Lewis v. Pansford*, 34 Eng. C. L. R. 584.)

§ 345. As has been before intimated, a settlement of property upon a wife by articles of separation does not affect the right of purchasers or creditors, unless it be made upon ample pecuniary consideration, or there be a covenant, on the part of some friend of the wife, or her trustees, to indemnify the husband. Indeed, all post-nuptial settlements of property, whether with a view to a separation of the husband and wife or not, are void as to creditors and purchasers in good faith, unless made upon adequate consideration, and such a consideration as would bar creditors in other cases between debtors and creditors. A reference to some of the authorities will illustrate the rule.

A marriage settlement made when the husband was deeply in debt, covering the greater part of the grantor's property, on the eve of judgment, and not recorded, was held absolutely void as to creditors. (*Croft v. Arthur*, 3 Dessau. R. 223.)

A conveyance of the whole of his property by a husband to trustees, for the benefit of the wife and his issue, is a voluntary

conveyance, and the subsequent sale of the property is carried back to the deed of settlement, and considered as proving that deed to have been executed with a fraudulent intent to deceive a subsequent creditor. (*Cathcart v. Robinson*, 5 *Peters' R.* 264.)

A voluntary settlement after marriage, in pursuance of a parol agreement entered into before marriage, is not valid as to creditors, and especially if the post-nuptial agreement does not recite the parol antenuptial agreement. But a settlement after marriage in pursuance of a valid written agreement before marriage, is good. (*Reade v. Livingston*, 3 *Johns. Ch. R.* 488.) And *vide Satterthwaite v. Greeley*, 3 *Green's Ch. R.* 489.) And a settlement after marriage, on a wife, of property belonging to her before marriage, in pursuance of an antenuptial parol agreement, is good as against creditors. (*Wood v. Savage*, *Walker's Ch. R.* 471.) A post-nuptial settlement by a husband upon his wife, is void as to creditors then existing, but may be good as to subsequent creditors. (*Bank U. S. v. Ennis*, *Wright's [Ohio] R.* 604. But *vide Picquet v. Swan*, 4 *Mason's R.* 443.) When it is established that, at the time of a voluntary settlement on the wife by the husband, he was indebted to any amount, the burden of proof is on the claimant under the settlement to show the solvency of the husband sufficient to establish that it was not covinous. Such a settlement, though not fraudulent *per se*, if made with a fraudulent intent as to any creditor then existing, or who might in future exist, would be void. (*Woolsten's Appeal*, 51 *Penn. R.* 452. *Vide also Hudnal v. Wilder*, 4 *McCord's R.* 294.) A voluntary settlement, of either lands or chattels, by a person indebted at the time, for the benefit of his wife and children, is void as against creditors. (*Bayard v. Hoffman*, 4 *Johns. Ch. R.* 450. But *vide Teasdale v. Reaborn*, 2 *Bay's R.* 546.) A post-nuptial settlement in pursuance of a parol agreement entered into before marriage is not valid, if the husband be indebted at the time of the settlement, and as to his antecedent creditors, it will be declared absolutely void. (*Borst v. Corey*, 16 *Barb. R.* 136.)

§ 346. But all the authorities agree that a post-nuptial agreement between husband and wife, by which property is set apart for the wife, though void at law, will be sustained in equity, unless the rights of creditors interfere. (*Wood v. Worden*, 20 *Ohio R.* 518. *Garlick v. Strong*, 3 *Paige's Ch. R.* 440.) And a fair post-nuptial agreement by which the conveyance of land is provided for, will

be enforced and a conveyance decreed after the death of the husband. (*Thomas v. Brown*, 10 *Ohio St. R.* 247.)

A post-nuptial agreement between husband and wife, by which the husband settled upon his wife the land and personal property which had come to the wife by descent, the personalty being about equivalent to her equity, was sustained as to that, but declared void as to his tenancy by the curtesy initiate, at the suit of his creditors. (*Wickes v. Clarke*, 8 *Paige's Ch. R.* 161.) The wife's equity in a legacy is a sufficient consideration for a post-nuptial agreement of the husband that a part of it, when collected, shall be appropriated for the sole benefit of herself and her children. (*Partridge v. Havens*, 10 *Paige's Ch. R.* 618.)

In a contract between the wife, by the obligee as her trustee, and the husband's personal representative, a bond given by the husband, after marriage, to secure to her the amount of a legacy bequeathed to her by her father's will, was held valid. (*Northrup v. Barnum*, 15 *Wend. R.* 167.)

The presumption that he who supplies the money to make a purchase, intends it for his own benefit rather than that of another, does not apply in cases like that of parent and child, or husband and wife, when the purchase may fairly be deemed to have been made for another from motives of natural love and affection. The presumption in such cases is, that the purchase is intended as an *advancement*, and it will be sustained unless the contrary is established by proof. Upon this principle, when a purchase is made by a husband, and the deed taken in the name of the wife, a resulting trust cannot be established in favor of the husband without some evidence to rebut the presumption that the deed was intended as a provision in the wife's favor. (*Wilton v. Devine*, 20 *Barb. R.* 9. *Vide also Jencks v. Alexander*, 11 *Paige's Ch. R.* 619.)

§ 347. The doctrine of the authorities upon the subject of agreements for a separate maintenance has been intelligently extracted, and the following conclusions arrived at: "First, that they are valid, and will be enforced both at law and in equity, without the intervention of a trustee to support them; secondly, that they are valid both against purchasers and creditors, when made in pursuance of an agreement in writing, entered into by the parties anterior to the marriage, the marriage in such case being a valuable consideration for the settlement, and that when made after marriage, though void as against creditors at the time of the conveyance, they

are valid against subsequent purchasers and creditors; and, thirdly, that they are not contrary to the spirit and policy of the law. It would, indeed, be strange that when, from family discords or otherwise, a separation between husband and wife becomes indispensably necessary to the happiness of both, that the law should refuse its sanction to a provision made by the husband to shield the wife, when he is amply able and willing to place her in a situation where she will be protected from poverty and want, and no longer be a burden upon her friends; or when his brutal insults may have driven her forth upon the world, that the law should not grasp at that momentary relaxation of his barbarity which influences him to provide such a settlement for his wife. But this question is now too well settled to be longer susceptible of litigation; and the courts of law and equity, both in England and the United States, now almost universally lend their assistance in carrying out the humane provisions in support of the wife." (*Reeve's Dom. Rel. 3d ed. 181, note 1.*)

§ 348. The terms "separate estate" and "separate use" are very often used in connection with the rights of a *feme-covert* as synonymous, but there is a great difference in their real signification. The expression "separate estate" means property given or settled to the separate use of a married woman, or as it is defined in a late case, it means an equitable estate held by some one in trust for a married woman. (*Todd's Appeal, 24 Penn. R. 429.*) Or, according to Judge Bouvier, by the term separate estate is meant that property which belongs to a married woman, and over which her husband has no right in equity. (*4 Bouv. Inst. 272.*) The estate may consist of lands or personal chattels.

According to Lord Bacon, "a *use* is an owner's life in trust." (*3 Bacon's Works, 298.*) As the word *uses* was employed in the Roman civil law, it meant a right to take so much of the fruit or profit of a thing as was needed for sustenance; and by the common law a use is the right in equity to have the profit or benefit of lands or tenements; or it means a confidence reposed in one who has the property in possession, or in whom is the legal title, that he will hold it for the use or benefit of another, who is called the *cestui qui use*. It will be seen, therefore, that the two terms "separate estate," and "separate use," although often spoken of together, and in many respects similar in their meaning, are different in important particulars. The first term is invariably

applied to property or interests of a married woman, while the latter may be applied either to certain equitable rights or interests of a *feme-covert*, or others.

A separate use in the wife can be created only by an instrument expressly showing the donor's intention to bar the husband's marital rights. (*Frith v. Caldwell*, 31 *Penn. R.* 228.) And a separate use for a married woman expires upon her discovery, and she is then entitled to receive the *corpus* of the estate (*Harris' Estate*, 3 *Phila. R.* 326. *Harrison v. Brolasky*, 1 *Am. Law Reg.* 439.)

A post-nuptial settlement and conveyance in trust to receive the rents and profits of the land and pay them over to a married woman, to her separate use, is a valid express trust, and the wife cannot in any manner assign or dispose of her interest, nor charge or contingently dispose of the rents and profits. (*Noyes v. Blake-man*, 3 *Sand. R.* 531. *S. C. 6 N. Y. R.* 567.)

No technical form of words is necessary to create a trust for the separate use of a married woman. If the property be vested in a trustee, and the trust declared to be for her sole use and benefit and the money to be paid to her individually, it is equivalent to providing for payment to the wife upon her separate receipt, and to exclude the husband. (*Stuart v. Kissam*, 2 *Barb. R.* 493. *Vide L'Amoureux v. Van Rensselaer*, 1 *Barb. Ch. R.* 34.)

A conveyance by a husband of all his right in his wife's property in trust, for her separate use and the use of her children, is valid, not only as to the husband, but as to his creditors. (*Donnelly's Estate*, 2 *Phila. R.* 51.)

CHAPTER XXV.

ACQUISITIONS OF THE WIFE DURING COVERTURE—TRANSACTIONS BETWEEN HUSBAND AND WIFE—REAL ESTATE CONVEYED TO HUSBAND AND WIFE, HOW HELD—WIFE'S REAL PROPERTY, HOW TRANSFERRED.

§ 349. THE effect of the separate use or trust is to enable a married woman, in direct contravention of the principles of law, to acquire property independently of her husband, and to enter

into contracts and incur liabilities in reference to such property, and dispose of it as a *feme-sole*, notwithstanding her coverture and disability at law. But independently of the acquirement by the wife of separate property by the means of the separate trust before considered, there are ways by which she may obtain property apart from her husband, and hold it entirely free from his interference. For example, she may acquire property by carrying on trade on her own separate account apart from her husband. She may do this under a particular custom of the city of London, in which case it must be done strictly with the terms of the custom. The trade must be carried on within the city, and on the wife's sole account; for if by any means it can be proved that the husband had any concern in the trade, the case will not be protected by the custom. But the intermeddling of the husband is expressly provided against by the husband. He may, however, determine his wife's trading in future; but he cannot do so in retrospect, neither can he do any act to injure her creditors, who are entitled to be satisfied out of her property in trade. But after these demands are satisfied, it seems he may by law possess himself of the surplus of her property; for the custom does not extend to this point, it regarding only trade and commerce. (*Lavis v. Phillips*, 3 Burr. R. 1782.) This local custom, however, is of little general importance, although the same custom may prevail elsewhere than in London.

§ 350. But the ability of the wife to carry on business on her own individual account, may arise in consequence of express agreement between her and her husband before marriage, or from his subsequent permission. Upon the abstract question of the legal power of the wife to carry on trade upon her separate account during marriage, Lord Mansfield has observed, "that whether by any means a man might before marriage put his intended wife in a situation to carry on a separate trade, there was no authority that he might not do so." (*Jarman v. Walloton*, 3 Term R. 620.)

When the agreement is made previously to the marriage, the marriage being a valuable consideration, the transaction will not only be obligatory upon the husband, but it will also be binding upon his creditors. When the agreement originates during the marriage, it will be void against his creditors but good against himself, and all persons claiming as volunteers from or through him, upon the same principle that a post-nuptial settlement is valid, except as against creditors existing at the date of the settlement.

And in equity, securities given by or to the wife in her name, for a debt which she is allowed to contract in respect to her separate business, will be established against herself in respect to her acquisitions in such business, upon the principal of her power of acting as a *feme-sole*, and her absolute dominion over such separate acquisitions and concerns. (2 *Bright's Husband and Wife*, 298. *Vide Kassel v. Becker*, 25 *How. Pr. R.* 373.)

It has been held that a wife may become a sole dealer or trader, by permission of her husband, even without deeds between them, and therefore she becomes entitled to all her earnings, as her separate estate. (*Megrath v. Robertson*, 1 *Dessau. R.* 445.)

The personal savings of the wife, the result of her labor, may with the assent of the husband, be applied to her separate use, so far as the husband and his representatives are concerned, though not as against the creditors of the husband. (*Bashaw v. Chamberlain*, 7 *B. Mon. R.* 443.)

The husband may, by gift or contract, create in his wife a separate estate in the proceeds of her own labor; the validity of such gift as against creditors, being subject to the same rules which apply to other voluntary conveyances. (*Pinkston v. McLemore*, 31 *Ala. R.* 308.)

§ 351. If the husband deserts his wife, and refuses to perform his marital obligations and duties, the acquisitions of property by the wife, during such desertion, are her own, and of course she may dispose of them as she pleases. (*Stenett v. Wynn*, 17 *Serg. & Rawle's R.* 130. *Lawrence v. Spear*, 17 *Cal. R.* 421. *Beadam v. Pratt*, 1 *Ohio St. R.* 403.) And in these cases the doctrine is recognized that the wife in such circumstances may sue and be sued as a *feme-sole*. (*Vide also Cecil v. Juxon*, 1 *Atk. R.* 278.)

In Pennsylvania, it has been held that a married woman left by her husband to obtain her own living, may claim compensation for her labor, and though she cannot sue in her own name at law, yet her marriage would make no objection in a court of equity. (*Spier's appeal*, 26 *Penn. R.* 233.)

And in the State of Ohio, it has been decided that a wife abandoned in a foreign country, and who comes to this country to reside after such abandonment, is competent to contract for necessities and acquire property by her own labor, and bring suits, and be sued, in the same manner as though she was a *feme-sole*. (*Wagg v. Gibbons*, 5 *Ohio St. R.* 580.)

When the husband, by his cruelty, drove his wife from his house without providing any means for her support, and she came to the State of Massachusetts and maintained herself there for more than twenty years as a single woman, and it appeared that the husband had always been a citizen and resident of another state, and had, since the expulsion of his wife, married and cohabited with another woman, it was held that she was entitled to do business, and sue and be sued as a *feme-sole*. (*Abbot v. Bagley*, 6 *Pick. R.* 89.)

In a previous case decided in the State of Massachusetts, it was held that a *feme-covert*, whose husband deserted her in a foreign country, and who had thereafter maintained herself as a single woman, and for five years had lived in that commonwealth, the husband being a foreigner, and having never been within the United States, was competent to act as a *feme-sole*, and receive the rewards of her personal labor and business; and, further, that she might sue and be sued as a *feme-sole*, and that her release would be a valid discharge for any judgment she might recover.

In giving the opinion of the court, Putnam, J., said: "Misérable, indeed, would be the situation of those unfortunate women whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion. If that were the case, they could obtain no credit on account of their husbands, for no process could reach him; and they could not recover for a trespass upon their persons or their property, or for the labor of their hands. They would be left the wretched dependents upon charity, or driven to the commission of crimes to obtain a precarious support. * *

The case at bar comes within the spirit of the rule of the common law, founded in reason and necessity, in cases of exile and abjuration. The plaintiff has been domiciled here many years as a *feme-sole*. Her husband is an alien; and never was and is not expected ever to be in this country. He abandoned his wife, and for a great number of years made no provision for her support in his own country. He has not, it is true, abjured *his* country; but he has compelled his wife to abjure it. This should not make the case better or worse for her. If the husband had been a native citizen, and had deserted his wife, and became a subject of a foreign state, the law would be clear for her, upon the adjudged cases.

"We are satisfied that the plaintiff may acquire property, and be permitted to sue, and is liable to be sued as a *feme-sole*, and that

her release would be a valid discharge for the judgment she may recover." (*Gregory v. Paul*, 15 *Mass. R.* 31, 34, 35.)

The desertion of the husband, however, which will effect this must be complete and absolute, and continued with the intent to renounce *de facto* the marital relation, and leave the wife to act as a *feme-sole*. (*Gregory v. Pierce*, 4 *Metc. [Mass.] R.* 478.)

When husband and wife live apart by voluntary separation, the wife is entitled to all acquisitions of property which may arise from her personal services, and it has been held that in such a case she may sue and be sued as a *feme-sole*; but the better doctrine is, that, independent of statutory provision, a *feme-covert* cannot sue or be sued alone, while living apart from her husband under a deed of separation. (*Vide Hyde v. Price*, 3 *Ves. R.* 443. *Beard v. Webb*, 2 *Bos. & Pul. R.* 105. *Wardell v. Gooch*, 7 *East's R.* 582. *St. John v. St. John*, 11 *Ves. R.* 529. *Baker v. Barney*, 8 *Johns. R.* 72.)

§ 352. In the State of Maine, it has recently been held that the general rule is, that a married woman cannot make a binding contract, or be the subject of a suit; but if there has been a desertion by the husband, in the ordinary meaning of the term, and their separation has been long continued, and is so complete that he must be regarded as having renounced all his marital rights and relations, such a case would be an exception to the rule, and she would be treated as a *feme-sole*; and that evidence that the separation was by the mutual consent of the parties, and that provision for a separate maintenance of the wife was made by the husband, tends to prove such a renunciation, but does not render the conclusion inevitable that the husband has renounced all his marital rights. (*Ayer v. Warren*, 47 *Maine R.* 217.)

§ 353. In the State of New York, it has been held that previous to 1860 the common law controlled the relation and rights of husband and wife in respect to the services of the latter, and that an agreement made prior to that date, between a married woman, with the knowledge and consent of her husband, and a third person, for personal services to be rendered by the wife, who agreed that she should be paid what her services were worth, gave to the wife no title to her earnings in her own right; and that in law such earnings belonged absolutely to the husband, and the promise to pay her was, in law, a promise to pay the husband. In giving the opinion of the court the judge remarked: "It does not need

the citation of authorities to prove that by the common law the husband and wife are but a single person, and that during coverture the husband is entitled to all the services and earnings of the wife, as well as her personal estate, which vests in him absolutely the moment it comes into his possession, as one of his marital rights. * * * It follows from this that the plaintiff has no right to these earnings which can be enforced in an action at law, nor indeed in equity. She has no more right to collect the debt than any other third person. For, although the agreement was with her, and she was to be paid, she was incapable of entering into any such contract on her own account at the time, and could acquire no separate right by it. The assent of the husband was nothing in law, other than that she might labor on his account and receive the money for him as his agent; even if the fact found can be construed into a consent that the money might be paid directly to her." (*Woodbeck v. Havens*, 42 Barb. R. 66, 69.) Here it did not appear that the husband expressly permitted his wife to do the work upon her own account, and receive compensation for her separate use; and yet the tenor of the decision is to the effect that, if such fact had appeared, it would not change the result. This would seem to be in conflict with the doctrine laid down in South Carolina that a wife may become a sole trader by *permission* of her husband, and thereby becomes entitled to all her earnings as her separate estate. (*Vide Magrath v. Robertson*, 1 Dessau. R. 445.) But in the State of Massachusetts, it has been held that an antenuptial agreement that the wife shall have her own earnings to her separate use is fraudulent and void as against previous or subsequent creditors of the husband. (*Keith v. Wombell*, 8 Pick. R. 215.)

In Kentucky, it has been held that when the acquisition of the title to property is fair, the husband's rescission of the contract whereby it was acquired cannot affect her, although she cannot hold an estate acquired by the joint fraud of herself and husband. (*Gere v. Summersall*, 5 Mon. R. 512. *Vide also Bashaw v. Chamberlain*, 7 B. Mon. R. 443.)

§ 354. The power of a married woman to carry on business on her own account, and to sue and be sued; is regulated in several of the states by statute, which will be particularly noted hereafter.

Of course, where the marriage is dissolved by an absolute divorce, the wife may then do business and receive all the fruits of her

business and personal earnings, the same as though she was never married; although upon this matter we have no very distinct light from the English common law. The approved doctrine, however, is that a divorce from the bond of matrimony places both parties, the innocent and the guilty, so far as this question is concerned, in the condition of single persons. Certain disabilities may still attach to the offending party, but so far as the acquisition of property is concerned, the condition of the parties is the same to all intents and purposes as though they had never been married.

Whether the wife, after a divorce from bed and board, may do business, and sue and be sued in all respects as a *feme-sole*, is a question of more doubt; and yet the better opinion is that she may. In a case in the supreme judicial court of Massachusetts, Chief Justice Shaw observed: "After such divorce, the law of this commonwealth recognizes her right to acquire and hold property, to take her own earnings to her own use, for the support and maintenance of herself and children. She is deprived of the protection and exempted from the control of her husband. She may, by the decree of the court granting the divorce, and pursuant to the provisions of the statute laws of the commonwealth, be charged with the custody, and consequently with the support and maintenance, of the children of the marriage. The reason, therefore, why a wife cannot sue or be sued without joining and being joined with her husband, does not exist. But the relation in which the divorce *a mensa et thoro* places the parties, opposes such joinder. If it were necessary to join the husband as plaintiff, he might release her rights, by which she would be subjected to costs; if he might be joined as defendant, he might be made subject to her debts; both of which consequences are repugnant to the new relation of divided and separate interests, in which the law by such a decree places them. Whilst the law thus recognizes the right of a woman so divorced to acquire and take the proceeds of her industry to her own use, it recognizes her power to make contracts; and if she could not sue or be sued, it would present the anomalous case in which the law recognizes a right without affording a remedy for vindicating it, and subjects a party to a duty without lending its aid to enforce it." (*Pierce v. Burnham*, 4 Metc. R. 303, 305. *Vide also Dean v. Richmond*, 5 Pick. R. 461.) And there are cases in others of the states where the same doctrine is favored. (*Vide Lefevre v. Murdock*, *Wright's R.* 205. *Taylor v. Simpson*, 5 J. J.

Marsh. R. 689. *Benadum v. Pratt*, 1 *Ohio St. R.* 403. *Prather v. Clarke*, 1 *Tread. R.* 453.) This would seem to be a very reasonable doctrine, and yet there are authorities apparently opposed to it. (*Vide Burr v. Burr*, 10 *Paige's Ch. R.* 166. *Clark v. Clark*, 6 *Watts & Serg. R.* 85. *Barber v. Barber*, 1 *Chand. R.* 280.)

§ 355. It may be remarked that the capacity of a *feme-covert* to contract, and her liability for her debts, being exceptional cases, a plaintiff who seeks to charge her by a judgment must bring his case within some of the exceptions stated. (*Mahen v. Gormley*, 24 *Penn. R.* 80.)

When the declaration contains no averment respecting the origin of the debt, the plea of coverture is a good defense of the wife. If the plaintiff wishes to avoid the effect of such a plea, he must set forth in his replication the special circumstances which make the wife liable notwithstanding her coverture, or amend his declaration so as to do so. (*Murry v. Keyes*, 35 *Penn. R.* 484.) It is proper that this doctrine be borne in mind in connection with the subject of the wife's acquisitions during coverture, as the subjects are closely related.

When the husband and wife cohabit, the presumption always is that the labor or business of the wife is on the account of her husband. When a wife and her son went into business together, and her husband acted as their business agent, the court required strong proof that the property was the separate estate of the wife, as against the creditors of the husband, on account of the legal presumptions to the contrary. (*Horneffer v. Duress*, 13 *Wis. R.* 603.)

§ 356. When the husband permits the wife to have and make profit of certain articles of his property, either for her own use, or in consideration of her supplying the family with particular kinds of necessaries, or when he makes to her a yearly allowance for the keeping of his house, the profits in the first case, and the savings in the other, have in equity been considered as the wife's own separate estate, although it is admitted that at law, upon the principle that all the personal property which a married woman acquires is that of her husband, they belong to him. This doctrine has been recognized in several cases in England, especially where there was no creditor of the husband to contend with. (*Vide Slanning v. Style*, 3 *P. Wms. R.* 337. *Calmady v. Calmady*, 11 *Vin. Abr.* 181. *Mangey v. Hungerford*, 2 *Eq. Ca. Abr.*

156, *in margin*.) The same doctrine has been recognized to the fullest extent by the courts of North Carolina. (*Kee v. Vassar*, 2 *Iredell's Eq. R.* 553.)

But Mr. Roper remarks: "These cases, in which the wife has been considered to have a separate property in her savings out of a voluntary allowance from her husband, are shaken by later authorities, which have laid down the principle that the wife cannot acquire separate property from her husband, except by a clear, irrevocable gift, either to some person as a trustee, or by some clear and distinct act of his, by which he divests himself of the property, engaging to hold it as a trustee for the separate use of his wife." (2 *Roper on Husband and Wife*, 104, *note*.) And in a leading case, when the question was as to the wife's right to jewels, stated to have been bought out of a yearly sum allowed by her husband for her expenses during cohabitation, the lord keeper thought that would make no difference, that if the wife saved any thing out of such allowance, it belonged to the husband. (*Tyrrell's case*, 1 *Freem. R.* 304.)

§ 357. Upon the principle of union of husband and wife so as to be but one person, the husband cannot by any common law conveyance give or grant any estate to the wife, either in possession, reversion or remainder; and the same disability at common law prevails in regard to the wife. But there are transactions between husband and wife which, though void at law, are good in equity, and will be supported when they are *bona fide*, and not intended as covers for fraud, nor are such unreasonable acts as to prevent the interference of the court.

It has been held that the wife may take from the husband by a purchase made by him in her name, or in their joint names, which will be presumed to have been intended as a gift and advancement to her, unless evidence of a different intention be adduced. (*Kingdom v. Bridges*, 2 *Vern. R.* 67. *Glaister v. Hewes*, 8 *Ves. R.* 99.) And in a case where the husband purchased stock in the name of himself and wife, Lord Eldon said that, *prima facie*, it was a gift to her in the event of her surviving, unless evidence of contemporaneous acts showing a contrary intention was produced. (*Coates v. Stevens*, 1 *You. & Col. Ex. R.* 66.) A transfer by the husband of stock already purchased, into his wife's name, or into their joint names, would *a fortiori* be presumed to be a gift to her; a transfer being stronger evidence of an intention to give than a purchase in

the name of another. (*George v. Bank of England*, 7 *Price's R.* 646. *Rider v. Kidder*, 10 *Ves. R.* 360. *Dummer v. Pitcher*, 5 *Sim. R.* 25. *Low v. Carter*, 1 *Beav. R.* 426.) But it has been said that gifts from husband to wife must be reasonable, or they will not be sustained. Thus in a case where the husband, by a deed-poll, gave and granted to his wife all the property which he then had or might afterward have, Lord Hardwicke said that such a grant or gift could not take effect, because the law would not permit a man to make a grant or conveyance to his wife during his life, and that the court would not allow the wife to have the whole of her husband's estate while he lived, for that was not in the nature of a provision, which was all that she was entitled to. (*Beard v. Beard*, 3 *Atk. R.* 72.) And yet there must be satisfactory evidence that the husband has divested himself of the property, and agreed to hold it as trustee for his wife. (*Walter v. Hodge*, 2 *Swanst. R.* 107. *McLean v. Langland*, 5 *Ves. R.* 79.) Or as was said by the master of the rolls in the case of *McLean v. Langland*, involving the validity of a gift from the husband to his wife, there must be nothing less than a clear, irrevocable gift, either to some person as a trustee, or by some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife. When the gifts are not from the husband but from strangers either before or after marriage, the wife is entitled to them in her own right, and the husband will be regarded as the trustee of the wife for her separate gift, where she receives it after the marriage, in case no other trustee is appointed. (*Graham v. Londonderry*, 3 *Atk. R.* 393. *Riley v. Riley*, 25 *Conn. R.* 154.) These cases are clear of many of the questions which arise where the gift is direct from the husband.

§ 358. The American authorities are quite uniform to the effect that although gifts directly from husband to wife, or from wife to husband, are not good at law, yet in equity they may be supported, when they are not prejudicial to creditors, even without the intervention of trustees. A brief reference to the spirit of some of the cases will be all that is necessary to understand the rule as it is recognized by the courts of this country.

When there was an antenuptial agreement, by which the wife released all her dower to arise under the marriage, on the agreement of the husband that she should be endowed of all land

acquired by them during the marriage, and after marriage the husband gave his wife a deed of certain lands, parcel of his estate, for the purpose of making a suitable provision for her when he should leave her a widow, to be held by her during her widowhood, the late court of chancery of New York held that equity would lend its aid to enforce the provisions of the deed, and the conveyance was declared operative. (*Shepherd v. Shepherd*, 7 *Johns. Ch. R.* 57.) When the husband who was about to sell his estate, agreed with his wife, and with the knowledge of the purchaser, that if she would join in a deed of the premises so as to release her dower, she should receive a certain portion of the purchase-money as her separate property, free from the control of the husband; and the purchaser gave a note to the wife for her share of the purchase-money; and the agent for the wife, in whose hands the note had been placed for her use, loaned a part of the money received on the note, and took a bond and mortgage directly to the wife; and the husband afterward assigned the mortgage to the original purchaser of the estate without the assent of the wife or her agent; it was held by the late court of chancery of the State of New York, that in equity the bond and mortgage belonged to the wife, and that she was entitled to the money due thereon, for her separate use. (*Garlick v. Strong*, 3 *Paige's Ch. R.* 440.) When a husband caused to be purchased certain articles of silver plate of considerable value, intended as a present for his wife as expressed by him at the time, and after the purchase he received the articles, and with his own hand gave and delivered the same to his wife, as her own separate property, and always after spoke of the same as her separate property until his death, the late court of chancery of New York held that the gift was perfect in equity and should be protected; declaring, however, that to make a gift *inter vivos*, valid from husband to wife, there must be a divesting of the title, and the act of giving must be clearly proved, and be irrevocable. (*Neufville v. Thomson*, 3 *Edw. Ch. R.* 92.) In pronouncing judgment, the vice-chancellor observed: "In equity, gifts to the separate use of a married woman, as well those presented by the husband in his life-time as those given by third persons, with or without the intervention of trustees expressly named, will be protected in cases where they have been made in good faith, and the rights of creditors are not infringed. The case of *Walter v. Hodge* (2 *Swanst.* 97; *S. C.* 1 *Wils. Ch. R.* 445) contains all that it is necessary to refer to on the

subject. It admits the proposition that, in equity, a gift by a husband to his wife may, under circumstances, be valid; that she may in this way acquire property to her separate use during coverture, and, if necessary, this court will consider the husband a trustee for her." (*Ib.* 93, 94.)

§ 359. When a husband borrowed money of his wife which came to her from a former husband, and gave her his promissory note for it, it was held in the State of Ohio that the note was good, and after the death of the husband that it could be set up in equity against the husband's administrator; and the court reiterated the doctrine in the same case that a husband may settle a separate estate upon his wife, which will be valid, except as to creditors of the husband existing at the time of the settlement. (*Huber v. Huber*, 10 *Ohio R.* 371, 373.) And in another case in the same state, the court held that the husband may settle a separate estate upon his wife, which will be good in equity without the intervention of a court of equity. (*Wood v. Worden*, 20 *Ohio R.* 518.)

When real estate was purchased by the husband, and a deed taken to his wife subject to a mortgage, and the land covered by the deed was sold by virtue of an execution against the husband, and the purchaser got possession by an action of ejectment against the wife, and subsequently the mortgage was foreclosed, and the land sold for a sum more than sufficient to pay the amount of the mortgage and costs of foreclosure, it was held in Pennsylvania that the wife was entitled to the surplus money. (*Woolston's appeal*, 51 *Penn. R.* 452.) And, in the same state, it was held that a transfer of land directly to the wife by the husband conveys nothing, though it respects the wife's interest. This, of course, is the rule at law, however the court might have held the rule to be in equity. (*Parker v. Stuckert*, 2 *Miles' R.* 278.)

When a leasehold estate was conveyed to husband and wife, and the reversion was subsequently sold to the husband alone, it was held, in the State of Maryland, that the deed to the husband, at common law, extinguished the leasehold interest. (*Lawes v. Lumpkin*, 18 *Md. R.* 334.)

When the husband, for a valuable consideration, mortgaged a farm to his wife, and the mortgage was recorded, and afterward the husband and wife joined in a deed granting the land by apt words of conveyance, it was held, in Ohio, that the land went clear of all equities of the wife. (*Gregory v. Gregory*, 16 *Ohio St. R.* 560.)

It has been held in Pennsylvania, that a conveyance of land by a father to his daughter and her husband, which was intended as an advancement or gift to the daughter, vests no estate in the husband except as a trustee for his wife. (*Bancord v. Kuhn*, 36 Penn. R. 383.) And in the same state it was held, that when a husband and wife convey the wife's land and take a mortgage to them jointly to secure the purchase-money, the husband has no legal right to release the mortgage without consideration. (*Trimble v. Reis*, 37 Penn. R. 448.)

§ 360. It has been held by the supreme court of the United States, that the income or profit arising to the wife from post-nuptial settlements, follows the nature of the principal estates, and cannot be taken by the husband or his creditors, but belongs to the wife, and is subject to the control and disposition of the wife. That it is her separate property, and when invested by her will be protected for her use; and into whosoever hands it comes, it is clothed with the trust for her, and not for her husband, even when no trustees are expressly provided for. (*Picquet v. Swan*, 4 Mason's R. 443.)

It has been held in the State of Louisiana, that a donation of a sum of money at a future time, by a marriage contract, does not require a delivery, neither is it necessary that it should be in the form of a testament, to render it valid. (*Wood v. Stokes*, 13 La. An. R. 143.)

It has been held in Ohio, that when a husband carries on business in the name of his wife and with her means, and makes profits by his personal services, and no bargain was made between them concerning the business and the profits arising therefrom, the wife, in equity, is a preferred creditor of her husband to get her own means out of the concern and the legal interest on it, and that the balance must go to the creditors of the husband. (*Glidden v. Taylor*, 16 Ohio St. R. 509.) But the contrary doctrine has been held in the State of Vermont, where it was decided in such a case that the creditors of the husband could take nothing on account of the business or the profits thereof. (*Webster v. Hildreth*, 33 Vt. R. 457.)

§ 361. In respect to gifts or grants of property by a husband to his wife after marriage, Judge Story says: "They are ordinarily, but not universally, void at law. But courts of equity will uphold them in many cases where they would be void at law; although, in other cases, the rule of law will be recognized and enforced. * * *

If the nature and circumstances of the gift or grant, whether it be express or implied, are such that there is no ground to suspect fraud, but it amounts only to a reasonable provision for the wife, it will, even though made after coverture, be sustained in equity. * * * It is true that courts of equity will require clear and incontrovertible evidence to establish such gifts, as a matter of intention and fact; but when that is established, full effect will be given to them." (2 *Story's Eq. Jur.* §§ 174, 175.)

Other authorities may be referred to and consulted wherein the doctrine is fully recognized that, although gifts directly from the husband to the wife are not good at law, that *in equity* they may be supported. (*Vide Duffy v. The Ins. Co. 8 Watts & Serg. R.* 413. *Gibson v. Todd*, 1 *Rawle's R.* 452. *Herr's appeal*, 6 *Law R.* 408. *Livingston v. Livingston*, 2 *Johns. Ch. R.* 537. *Bradish v. Gibbs*, 3 *ib.* 523. *Elms v. Hughes*, 3 *Dessau. Ch. R.* 158. *Bullard v. Briggs*, 7 *Pick. R.* 533. *Towers v. Hayne*, 3 *Wharton's R.* 48.) An insolvent husband cannot give property to his wife; but it has been held that, although he cannot do that, he may give to her his personal services, and her separate estate will not in such a case be made chargeable to her husband's creditors. (*Hoot v. Sorell*, 11 *Ala. R.* 386.)

It was held in Texas, that a husband may settle his property on his wife and family, when he can do so without impairing the rights of existing creditors. (*Reynolds v. Lansford*, 16 *Tex. R.* 286.) And in Maine the court decided that a husband may transfer his creditor's promissory note to his wife, unless it be done for an inadequate consideration, and with intent to defraud existing creditors. (*Motley v. Sawyer*, 38 *Maine R.* 68. *Vide also Barron v. Barron*, 24 *Vt. R.* 399. *George v. Spencer*, 2 *Md. Ch. Dec.* 353. *Meeds v. Meeds*, 21 *Eng. L. and Eq. R.* 556. *Deming v. Williams*, 26 *Conn. R.* 226. *Wells v. Treadwell*, 28 *Miss. R.* 717.)

A contract by the husband to pay the wife money had by him from her has been held in Pennsylvania to be void for want of parties. (*Johnston v. Johnston*, 1 *Grant's Cases*, 468. *S. C.* 31 *Penn. R.* 450.)

§ 362. With respect to the right of the wife to carry on trade on her sole account, Judge Story says that such right may be established by an agreement between the husband and wife before or after marriage. "When such agreement is entered into before marriage, it stands upon a valuable consideration; and, therefore,

if there is the interposition of trustees, it will be maintained against the husband and his creditors, as well at law as in equity.

* * * Even if no trustees are interposed, the property will, in the like case, be protected in equity against the claims of the husband and his creditors, and excepted out of the general rules which govern in cases of husband and wife.

“When the agreement for a separate trade by the wife occurs after marriage, and it is founded upon a valuable consideration, the like protection will be given at law, if the property is vested in trustees; and the property, and the income and profits thereof, will be held secure for the wife against the husband and his creditors. *A fortiori*, the doctrine will be enforced in equity. But if it is a voluntary agreement, it will be good against the husband only, and not against his creditors. Care, however, must be taken in all these cases, that the negotiations are not carried on in the name of the wife, as by taking notes and other securities in her name, for then they will, at law, be held to belong to the husband, although in equity it will be otherwise.

“We here-perceive that the law will give effect to such agreements only when those forms have been observed, which will vest the property in parties capable of enforcing the proper rights of the wife in legal tribunals; as is the case when the property is vested in trustees for her sole use and benefit, in order to enable her to carry on trade. But courts of equity will go further: and if there is any such agreement before marriage, resting in articles and without trustees, by which she is to be permitted to carry on business on her sole and separate account; or if, without any such antenuptial agreement, the husband should permit her, after marriage, to carry on business on her sole and separate account; all that she earns in trade will be deemed to be her separate property, and disposable by her as such, subject, however, to the claims of third persons properly affecting it. In the former case, the earnings will, in equity, be supported for her separate use against her husband and his creditors; in the latter, against him only, unless the permission after marriage arises from a valuable consideration. So, if a husband should desert his wife, and she should be enabled, by the aid of her friends, to carry on a separate trade, as that of a milliner, her earnings in such trade will be enforced in equity against the claims of her husband.” (2 *Story's Eq. Jur.* §§ 1385, 1386, 1387.)

§ 363. It may be well to note that when the wife carries on trade under an agreement made before marriage, and the property is vested in trustees, the husband would not be liable to the payment of the debts relative to such trade, even at law. But if no trustees intervened, and the agreement was after marriage, then the husband would be liable at law for the debts contracted on account of the business. At least, he would be liable unless a credit was exclusively given to the wife in relation to the trade, or the trade had been carried on without his sanction or permission. If, however, he should be liable at law, a court of equity would relieve him, at least to the extent of making the funds in the trade applicable to the payment of the debts. (2 *Story's Eq. Jur.* § 1387, note 3.)

It has been held in the State of New York, that, independent of a statute allowing married women to take, hold and dispose of property, and carry on a trade as if they were single and unmarried, personal property purchased by a married woman, with the knowledge of her husband, and used by the wife in keeping a boarding-house, as a mode of supporting the family, belongs to the husband, and that he is liable for its price to the vendor, although it was bought in the name of the wife, and the boarding-house was conducted by her; and, further, that the husband is entitled to the profits of any business conducted by his wife, and is liable for articles bought with his knowledge and assent for the purpose of prosecuting it. (*Switzer v. Valentine*, 4 *Duer's R.* 96.)

And again, when a married woman, living and cohabiting with her husband, purchased goods upon credit and moved them to her residence, where she carried on the millinery business in her own name, it was held that the goods became vested in the husband at the moment of the purchase, and he was responsible for the payment of them. It was admitted, however, that in equity, the wife is allowed, through the medium of a trustee, to enjoy property as freely as a *feme-sole*. (*Lovett v. Robinson*, 7 *How. Pr. R.* 105, 106.) And once again, it was held that when a *feme-covert* purchases property on her personal credit, the title becomes vested in her husband, and the property is liable to be taken on execution for his debts. (*Glann v. Younglove*, 27 *Barb. R.* 480.)

§ 364. The deed of a *feme-covert*, without her husband joins with her in it, is voidable by her heirs or any of them; and if fraud be practiced on the husband to procure him to join in the deed, it is the

same as to him and his heirs as if he had not joined in the execution of the deed at all. (*Underwood v. Warner*, 3 *Phila. R.* 414.)

A fraudulent conveyance from a husband to his wife, through the medium of a third person, of the life estate of the husband in his wife's lands, will not prevent the creditors of the husband levying on the crops growing upon such land. (*Stehman v. Huber*, 21 *Penn. R.* 260.)

When the wife's separate property is lost or destroyed by reason of the wrongful act of a third party, or by such wrongful act, the property is made subject to the creditors of the husband, the wife may have an action against the wrong-doer for the value of the property lost or destroyed. (*Pierson v. Smith*, 9 *Ohio St. R.* 554.)

A wife who joins with her husband in a mortgage of her husband's land, may redeem the land after his death; and a suit in equity to foreclose such mortgage to which she is not a party is no bar of her equity of redemption. Process served on the husband alone, does not in the least affect the wife, and she is not bound by the judgment entered upon it. (*McArthur v. Franklin*, 15 *Ohio St. R.* 485.)

A husband can recover on a covenant made between himself and others for the purpose of defrauding his wife out of her interest in real estate *owned by him*, on the principle that obligors in a fraudulent bond cannot shield themselves from liability by alleging their own fraud. (*Evans v. Dravo*, 24 *Penn. R.* 62.)

In an action of ejectment against husband and wife by one who purchased land at a sheriff's sale on a judgment against the husband, it is competent for the plaintiff to prove that the wife, who now claims the land, used admissions of her vendor to show title in her husband, upon the trial of a former ejectment brought against herself and husband by the representative of such vendor. (*Winter v. Walter*, 37 *Penn. R.* 160.)

§ 365. With respect to the manner or capacity in which husband and wife hold real property conveyed to them jointly, the rule is not uniform in all the states, and it is sometimes the subject of statute. At common law, if an estate in fee be given to a man and his wife, they are neither joint tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout, et non per my*; that is, "by the whole, and not by a part;" the consequence of which is, that neither the husband

nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. The whole estate belongs to the wife as well as the husband, and hence neither alone can forfeit or alien the property. (2 *Black. Com.* 182.) And if a grant is made of a joint estate to husband and wife and a third person, the husband and wife will have one moiety, and the third person the other moiety, in the same manner as if it had been granted only to two persons.

So if the grant is to husband and wife and two others, the husband and wife take one-third in joint tenancy. In all these cases the husband and wife are counted as one person and take the interest of one person. (*Litt.* § 291.) But when an estate is conveyed to a man and a woman, who are not married together, and who afterward intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage. (*Moody v. Moody, Ambler's R.* 649. 1 *Inst.* 187 b.)

§ 366. The rule of the common law upon the subject of grants and conveyances to husband and wife jointly, is founded upon the principle of the unity existing between them in legal contemplation, and is the only rule that can be adopted which will preserve the symmetry of the law of husband and wife. The rule is, however, changed by statute, in some of the states, although it is usually recognized where no statute to the contrary exists. This rule is the settled law of the State of New York. It has been held by the court of appeals of that state that, when land is conveyed to husband and wife, they do not take as joint tenants or as tenants in common; for, being considered as one person in law, they cannot take by moieties, but both are seised of the entirety, and neither of them can dispose of any part without the assent of the other, and the whole goes to the survivor. (*Torrey v. Torrey*, 14 *N. Y. R.* 430. *Wright v. Sadler*, 20 *ib.* 320.) This, it will be observed, is in exact accordance with the common law doctrine upon the subject.

The supreme court of the State of New York, has also recognized the same doctrine, and in similar language. That court laid down the rule, that a deed to a husband and wife and to six children, naming them, and to such other children of the marriage as might be subsequently born, creates a tenancy in common between the husband and wife and the children, the husband and wife, being considered in law but as *one person*, take while there

are six children, *one-seventh* of the estate granted, and when two more children are born, take only *one-ninth* of the estate. And that, as between themselves, the husband and wife hold neither as joint tenants or as tenants in common—each is seised of the entirety *per tout et non per my*, and for that reason the husband alone cannot *alien* the estate; but having the absolute control of the estate *during his life*, he may convey or mortgage it during that period. (*Barber v. Harris*, 15 *Wend. R.* 615. *Vide also Jackson v. Stevens*, 16 *Johns. R.* 110. *Doe v. Howland*, 8 *Cow. R.* 277. *Jackson v. Suffern*, 19 *Wend. R.* 175.) And precisely the same doctrine was frequently enunciated by the late court of chancery of that state. (*Vide Dickenson v. Codewise*, 1 *Sand. Ch. R.* 214. *Dias v. Glover*, *Hoff. Ch. R.* 71. *Rogers v. Benson*, 5 *Johns. Ch. R.* 431.) Though it was held that a grant to a husband and wife is to have just such effect, in respect to the estate which they take, as was intended to be created. The deed purported to convey the property in distinct moieties, the one equal half part to each, and provided that neither should sell or incumber his or her half without the consent of the other, but to have power to devise it, in which case the survivor should nevertheless have the rents and profits of the whole for life, and that, in default of a will, the survivor should take the moiety of the decedent; the court held, that they took as tenants in common, and subject to the provisions of the deed. (*Hicks v. Cochan*, 4 *Edw. Ch. R.* 107.)

§ 367. The common law rule upon the subject also prevails in the State of Massachusetts. There the legislature passed a statute at an early day, which, after reciting that joint tenancies are often created by grantors and devisors against their intentions, through ignorance of the proper terms to create tenancies in common, which are more beneficial to the commonwealth, and consonant to the genius of republics, enacted that all conveyances and devises made to two or more persons, shall be adjudged to be tenancies in common, unless it manifestly appears to have been the intent of the parties to the instrument that joint tenancies were intended. It has been held that this provision does not apply to conveyances to husband and wife, as they are in law but one person, and the survivor will take the whole estate. In giving the opinion of the court, Chief Justice Parsons said: "Joint tenancies, when the tenants are not man and wife, may be severed, and the right of survivorship be defeated at the will of either tenant, either by par-

tion or by alienation of his property, which shall be holden by the purchaser as a tenant in common. For two joint tenants generally hold by moieties, and not by entireties. As, therefore, a joint tenancy of this nature may be destroyed at the pleasure of either tenant, the statute very reasonably presumes that such tenancy was not intended in the conveyance, and has enacted that, unless a joint tenancy appear to be intended, the estate shall be holden in common. But this construction of the statute cannot reasonably be extended to a conveyance to husband and wife. Here a severance of the tenancy cannot be had at the will either of the husband or the wife. They do not take by moieties, but by entireties; and the alienation of the husband of a moiety will not defeat the wife's title to that moiety, if she survive him. The statute speaks of conveyances to two or more persons; but a conveyance to husband and wife is, in legal construction, a conveyance but to one person. For if an estate be conveyed expressly in joint tenancy to a husband and wife and to a stranger, the latter shall take one moiety, and the husband and wife, as one person, shall take the other moiety." (*Shaw v. Hursey*, 5 *Mass. R.* 521, 522, 523. *Vide also Dutch v. Manning*, 2 *Dane's Abr.* 230.) And in other cases, although it is said that when the conveyance is to husband and wife, they are joint tenants, it is held that no conveyance by one can bind the other, and that the survivor will take the whole estate. (*Vide Fox v. Fletcher*, 8 *Mass. R.* 274. *Varnum v. Abbott*, 12 *ib.* 479.)

§ 368. So also the common law doctrine on the subject still obtains in many other of the United States. Thus in the State of New Jersey it was held that a conveyance of lands to husband and wife, made after their intermarriage, does not, strictly speaking, create them joint tenants, but creates a peculiar estate, of which they are seised not *per my et per tout*, as joint tenants would be, but solely and simply *per tout*. But that a conveyance of land to husband and wife, and to *his* heirs and assigns, vests in the wife a life estate, and in the husband a fee simple, in all the land conveyed. (*Deer v. Hardenbergh*, 5 *Halst. R.* 42.)

In the State of North Carolina, if lands are conveyed to husband and wife, they each have an entirety, and the survivor takes the whole estate, notwithstanding the act of 1784, section two. (*Motley v. Whitmore*, 2 *Dev. & Bat. R.* 537. *Needham v. Branson*, 5 *Ired. R.* 426.)

In the State of Kentucky, it has been held that the statute abolishing the *jus accrescendi* does not apply to the estate of husband and wife. (*Ross v. Garrison*, 1 *Dana's R.* 35.) And again it is expressly declared that an estate conveyed to husband and wife is not a joint tenancy, but each takes the entirety, and neither can alienate or forfeit it; and on the death of one the other is entitled to the whole. (*Ross v. Garrison*, *supra*. *Vide also Rogers v. Grider*, 1 *Dana's R.* 243.) But the statute of that state now provides that "when any real estate is conveyed or devised to husband and wife, unless a right by survivorship is expressly provided for, there shall be no mutual right to the entirety by survivorship between them; but they shall take as tenants in common, and the respective moieties be subject to curtesy or dower, with all other incidents to such a tenancy." (2 *Rev. Stat. ch.* 47, § 14.) This, it will be observed, is very clearly a modification of the common law rule upon the subject. And in the State of Ohio, it is held that when an equitable estate is conveyed to husband and wife, they hold as tenants in common; and the husband may, during the life of the wife, convey a moiety of such estate. Upon the wife's death, the husband surviving, he does not take the whole by survivorship, but her moiety descends to her heirs. So, if the husband die first, the wife does not take by survivorship, but a moiety descends to his heirs. (*Wilson v. Fleming*, 13 *Ohio R.* 68.) Or, according to the declaration in one case in Ohio, no joint tenancy exists between husband and wife, and the doctrine of survivorship is unknown. They take as tenants in common. (*Sergeant v. Steinberger*, 2 *Ohio R.* 305.)

In the State of Wisconsin, by a grant to husband and wife, they take as one person, not by moieties, and the wife surviving takes the estate discharged of the husband's debts, as well by the territorial statutes as by the common law; in other words, the common law rule upon the subject is recognized in all its force and incidents. (*Ketcham v. Walsworth*, 5 *Wis. R.* 95.)

In Connecticut, husband and wife are declared to be joint tenants, and the husband may convey his interest; so held where the estate was a term of years. (*Whittlesey v. Fuller*, 11 *Conn. R.* 337.)

In the State of Pennsylvania the common law rule applies; and it is held that husband and wife are both seised of the entirety, though the conveyance in terms is, to them as "tenants in common

and not as joint tenants." (*Stuckey v. Keefe's Executor*, 26 Penn. R. 397. *Vide also Fairchild v. Chistalleaux*, 1 Penn. R. 176.)

In the State of Maine it has been held in so many words that husband and wife are regarded in law as one person, and that when land is conveyed to them jointly, they are not seised of moieties, but of the entirety of the estate, and the survivor takes the whole. (*Harding v. Springer*, 2 *Shepley's R.* 407.)

In the State of Vermont the same doctrine is held, and in one case the court declared that husband and wife each has an entirety of interest with the right of survivorship, so that neither can convey any part of the estate without the consent of the other, and that on the death of the husband, the whole estate in the land so conveyed vests in the wife; and, if the creditors of the husband have levied upon the land in his life-time as his property, the widow may recover it from them in an action of ejectment. (*Brownson v. Hull*, 16 *Vt. R.* 309.) The common law rule upon the subject is also recognized in the State of Tennessee. (*Taul v. Campbell*, 7 *Yerg. R.* 319.)

§ 369. Upon the subject of conveyances to husband and wife, Mr. Cord states the doctrine, as gathered principally from cases decided in Kentucky, substantially as follows: "The unity of person subsisting between man and wife in legal contemplation permits their receiving separate interests in an estate conveyed to them during coverture. The estate of joint tenants is an unit, made up of divisible parts, subsisting in different natural persons; the estate of husband and wife is an unit not made up in any divisible parts, subsisting in different natural persons, but is an indivisible whole, vested in two persons who are actually distinct, yet who, according to legal intendment, are one and the same. On the death of husband or wife, the survivor takes no new estate or interest; nothing that was not in him or her before. It is a mere change in the properties of the legal person holding, not of the estate holder, and by the loss of an adjunct, reducing the legal personage to an individuality identical with the natural one. Not so, however, with regard to joint tenants. On the death of one a new interest, or additional estate, does accrue to the survivor by the *jus accrescendi*. The distinction between *joint* tenants and husband and wife holding by conveyance to them during coverture, is, therefore, not merely ideal and arbitrary, but is founded

in a substantial difference." (*Cord's Rights of Married Women*, §§ 109, 110, citing *Ross v. Garrison*, 1 *Dana's R.* 37, and *Rogers v. Grinder*, 1*b.* 243.)

§ 370. It remains now to state briefly the method by which the real estate of a *feme-covert* may be disposed of and transferred during coverture. By the common law, the only way by which a married woman could pass her real estate was by a fine, or a common recovery, for the reason that her conveyance, except by some matter of record, was absolutely void. She could levy a fine without her husband, which would be good as against her and her heirs, but the husband could avoid it during coverture, for the benefit of the wife as well as himself. (2 *Kent's Com.* 151.) But the substitute of a deed for a conveyance by fine has generally prevailed throughout the United States, as the more simple, cheap and convenient mode of conveyance. And in England, fines and recoveries have been abolished by statute, and the wife's real estate is now transferred by the deed of the wife with the husband's concurrence, and in special cases, without the concurrence of the husband, provided that her deed in all cases be acknowledged by her before a competent officer, on a private examination, apart from the husband. (3 and 4 *William IV*, *ch.* 74.) Chancellor Kent says that upon the view of our American law on the subject, we may conclude the general rule to be, that the wife may convey by deed; that she must be privately examined; that the husband must show his concurrence to the wife's conveyance by becoming a party to the deed; and that the cases in which her deed without such concurrence is valid, are to be considered as exceptions to the general rule; and, further, he says the weight of authority would seem to be in favor of the existence of a general rule of law, that the husband must be a party to the conveyance or release of the wife. Such a rule, he adds, is founded on sound principles arising from the relation of husband and wife. (2 *Kent's Com.* 152, 154.)

The method of the wife's acknowledgment of her deed, and the form of the certificate of acknowledgment to be indorsed by the officer taking it upon the conveyance, are prescribed by statute, and are similar in all the states. It is generally required that as to the conveyance of a *feme-covert*, the officer must certify that, on an examination apart from her husband, she acknowledged that she executed the deed freely, and without any fear or compulsion of her husband.

A married woman has no capacity to contract for the sale of her land or to convey it, except in the precise statutory mode. This is the rule at law, and equity follows the law, however meritorious the consideration. Equity will not aid defects which are of the essence of the power, nor supply any circumstance for want of which the legislature has declared the instrument void. (*Glidden v. Strupler*, 6 *Am. Law. Reg. [N. S.]* 635, 636. *S. C.* 52 *Penn. R.*)

§ 371. It may be convenient to note the substance of a few of the authorities upon this subject, giving the rule in several of the states.

The rule of the English common law, which disabled a *feme-covert* from conveying her real estate in any other manner than by fine or common recovery, was never in force in the State of New York, when it was a colony, or since. At least, it is held, that no such law has existed in that state since the colonial act of May 6, 1691, was rejected by the crown in 1697. (*Merriam v. Harson*, 2 *Barb. Ch. R.* 232.)

The statute of New York requires that the officer taking the acknowledgment of a conveyance of real estate, shall know, or have satisfactory evidence that the person making the acknowledgment is the individual described in and who executed the conveyance; and in case of a married woman, in addition to these requisites, she must acknowledge on a private examination, apart from her husband, that she executed the conveyance freely, and without any fear or compulsion of her husband. (1 *R. S. part 2, ch. 3*, §§ 9, 10. 1 *Stat at Large*, 709.) And it has been held that a married woman's deed is of no force until acknowledged by her, and that her acknowledgment does not relate back to her execution of it. (*Jackson v. Stevens*, 16 *Johns. R.* 110. *Jackson v. Cairns*, 20 *ib.* 301.) And if she freely acknowledge the deed after her husband's death, it becomes operative only from the time of such acknowledgment. (*Doe v. Howland*, 8 *Cow. R.* 277.) Her deed not acknowledged is a nullity. (*Gillett v. Stanley*, 1 *Hill's R.* 121. *Van Nostrand v. Wright*, *Lalor's R.* 260. *Curtiss v. Follett*, 15 *Barb. R.* 337.)

A *feme-covert* executed, by her maiden name, a conveyance of her land, bearing a date before her marriage, and it was proved and recorded, but the court held the deed void, because it was not acknowledged by her in statute form, and because her husband was not a party to it. (*Galliano v. Lane*, 2 *Sand. Ch. R.* 147.) But

subsequently it was doubted whether, in New York, the husband must join the wife in the conveyance of her estate, to give it validity. Parker, J., delivering the opinion of the court, said: "At common law a *feme-covert* could convey her real estate in no other way except by fine or a common recovery. Yet such has not been the law in this state; for although fines and common recoveries were not abolished here by statute till 1830 (2 *R. S.* 343, § 24) it had always previously been the practice for a married woman to convey by deed. Under the government of the colony of New York, a *feme-covert* conveyed by deed, upon the usual acknowledgment before a competent officer; and by the act of February 16, 1771, such previous conveyances were confirmed, and as to future conveyances it was enacted that no estate of a *feme-covert* should thenceforth pass by deed, without a previous acknowledgment made by her, apart from her husband, and on a private examination, that she executed the same freely and without any fear or compulsion of her husband. (*See Colonial Acts*, 3 *R. S.* 22.) This act prescribing the form in which the deed of a *feme-covert* should be acknowledged, has been substantially continued to the present time by the act of February 26, 1788. (2 *Greenleaf's Laws*, 99, § 3) April 12, 1813 (1 *R. L.* 369) and by the present statute in force when this mortgage was executed. (1 *R. S.* 758.) It was said by Justice Bronson, in *Bool v. Mix* (17 *Wend.* 128), it seems to have been assumed that we had not adopted the common law rule, and that a deed of a *feme-covert* was effectual to pass her interest in lands.

"It has never been judicially settled in this state whether a husband must join the wife in a conveyance to give it validity. It seems to have been taken for granted by Chief Justice Spencer, in *Jackson v. Vanderheyden* (17 *Johns. R.* 167), and by Justice Bronson, in *Gillett v. Stanley* (1 *Hill's R.* 125) that such was the rule. But in neither of these cases was the question presented for adjudication. It is said by Chancellor Kent, in 2 *Kent's Com.* 153, that the question is still undetermined in this State." (*The Firemen's Insurance Company of Albany v. Bay*, 4 *Barb. R.* 407, 411, 412, 413.) The better opinion is decidedly in favor of the rule that the deed of a *feme-covert*, properly acknowledged, is valid although the husband does not join with her in it. (*The Albany Fire Insurance Company v. Bay*, 4 *N. Y. R.* 9, 14, 19.) This being a decision of the court of appeals, the question may be

considered settled in the State of New York, although two of the seven judges who sat in the case dissented from that view, and held that the concurrence of the husband in the wife's deed was necessary in ordinary cases in order to make it effectual and valid. The rule is different in some of the other states, as will appear hereafter.

But however the rule may be at law, it seems that a *feme-covert* in equity may sell and transfer her separate estate by deed, and her husband's execution of it is not necessary, though he is named in it as a party. With regard to her separate property, which is that in which the husband has no interest, and over which he has no control, a *feme-covert* is to be regarded in equity as a *feme-sole*. (*Powell v. Murray*, 2 *Edw. Ch. R.* 636. *Affirmed*, 10 *Paige's Ch. R.* 256. *The Firemen's Insurance Company of Albany v. Bay*, 4 *Barb. R.* 407.) It is held, even, in regard to her separate estate, a married woman may dispose of it without the solemnity of an acknowledgment or private examination. Such disposition is in the nature of an appointment. (*The Albany Fire Insurance Company v. Bay*, 4 *N. Y. R.* 9.)

§ 372. The law upon the subject is the same as in New York in many of the states, while the rule is different in others. By the customary and ancient law of Rhode Island, a *feme-covert* may pass her real estate by a deed in which her husband is joined, which is duly executed and acknowledged. (*Manchester v. Hough*, 5 *Mason's R.* 67.)

In Massachusetts a *feme-covert* may convey her estate by deed, joining with her husband, as fully as the same could be conveyed in England by a fine and recovery. (*Durant v. Ritchie*, 4 *Mason's R.* 45.) Indeed the statutes of the state give a sanction to such a conveyance. But it would seem that in this state the deed of a *feme-covert* would not be valid except the husband join in it. Chief Justice Parker in one case speaks of the custom of married women conveying by deed as the common law of New England, and says "that the usage never extended to authorize the wife to convey any interest she has in lands without her husband joining in the deed of conveyance. (*Fowler v. Shearer*, 7 *Mass. R.* 14.) And the same was laid down as the custom by Judge Story. (*Powell v. Monson*, 3 *Mason's R.* 347. *Hall v. Savage*, 4 *ib.* 273. *Manchester v. Hough*, *supra*.) And at an earlier date Judge Wilde recognized the same doctrine in a case in which he declared

that "the deed of a *feme-covert* in which the husband does not join is void." (*Andrews v. Hooper*, 13 *Mass. R.* 476.) If the husband make a deed of land held in right of his wife, and she, in the close of the deed, merely relinquish all her right in the land, and execute the deed with her husband, such an instrument will not pass the estate. (*Lithgow v. Kavenagh*, 9 *Mass. R.* 161.)

In the State of Maine, the method of transferring the real estate of the wife is the same as in Massachusetts. (*Rowe v. Hamilton*, 3 *Greenl. R.* 63. *Shaw v. Russ*, 14 *Maine R.* 432. *Payne v. Parker*, 1 *Fairf. R.* 178.) And it is held in Maine that a *feme-covert* cannot bind herself, by an executory contract, to convey her own lands, even though her husband join with her in the obligation, and the same is for a valuable consideration. (*Ex parte Thomas*, 3 *Greenl. R.* 50. *Lane v. McKean*, 3 *Shepley's R.* 304.) And as to the deed of the wife for the land, it is ineffectual to pass the fee simple estate, though she sign, seal and acknowledge it in due form, unless her husband join as a party to the conveyance. (*Payne v. Parker*, *supra*.)

In the State of New Hampshire, the wife's real estate is transferred by the joint conveyance of the husband and wife, and it is necessary that they both join in the conveyance; the wife may alone, however, and in a separate deed, at a separate time, convey her right of dower. (*Ela v. Card*, 2 *N. H. R.* 176.) If the husband and wife join in a deed, and use language calculated to pass all their interest, it is immaterial that they do not use the same identical words in the instrument, if their legal effect is the same. (*Gordon v. Haywood*, 2 *N. H. R.* 402.) And again, when a deed of the wife's land purports to be the conveyance of the wife alone, and contains no recital that the husband is a party, but is executed by the husband and wife, it is regarded the deed of both, and passes the title of both. (*Woodward v. Seaver*, 38 *New Hamp. R.* 29.)

In the State of Vermont, the right of a married woman to convey her lands by deed, is given by statute to convey by "deed of herself and baron," and making her separate examination and acknowledgment necessary, and to be certified upon the deed. (*Sumner v. Conant*, 10 *Vt. R.* 20.)

In the State of Connecticut, the husband must join with his wife in the conveyance of the wife's real estate, by express provision of statute. (*R. S.* 1866, *tit.* 37, *ch.* 1, § 26.) A conveyance may be

void in part, and valid in part, under this statute. (*Hyde v. Morgan*, 14 Conn. R. 104.) A deed jointly executed by a *feme-covert* who was a native citizen, and her husband who is an alien, is valid and good to pass the land of which she is seised in fee. (*Whiting v. Stevens*, 4 Conn. R. 44.)

§ 373. In the State of New Jersey, by their early colony laws, the wife might convey her estate by deed, provided she was previously and privately examined by a magistrate; but as the law now stands there, her deed, without the co-operation of her husband, is absolutely void. (*Moore v. Rake*, 2 Dutch. R. 574.) And a *feme-covert* cannot bind herself or her heirs by covenant of warranty. (*Deer v. Crawford*, 3 Halst. R. 90.)

In Pennsylvania, the wife's lands are passed by the joint deed of the husband and wife; and the separate deed of the wife, purporting to convey real estate belonging to her in her own right, is void, whether against her or her husband, even though a full consideration has been paid to the wife for the estate conveyed. (*Richards v. McClelland*, 29 Penn. R. 385.)

A deed executed by the husband and wife for the wife's lands, but not delivered in her life-time, cannot be rendered effectual to pass the estate, as against the heirs of the wife, by a delivery after her decease. (*Schoenberger v. Zook*, 34 Penn. R. 24. *Same v. Hackman*, 37 *ib.* 87.) But though a wife's deed is void for defective acknowledgment, parol evidence may be given that she ratified it after her husband's death. (*Jourdan v. Jourdan*, 9 Serg. & Rawle's R. 268.)

A husband and wife joined in a conveyance of the wife's lands to trustees for certain uses, and afterward they acknowledged the deed before a justice of the court of common pleas, who indorsed upon the deed that the wife was examined apart from her husband, and declared that she had voluntarily executed it; it was held that this was a good conveyance according to the usage in Pennsylvania. (*Davey v. Turner*, 1 Dall. R. 11. And *vide Lloyd v. Taylor*, *Ib.* 17. *Watson v. Bailey*, 1 Binney's R. 470.)

A married woman by agreement signed only by herself and without an acknowledgment, contracted to sell land, and received one year's interest and a small part of the purchase-money. The purchaser took possession and made improvements, with her knowledge and encouragement. It was held that neither the principle of estoppel nor compensation would prevent her recovering the

land. (*Glidden v. Strupler*, 6 *Am. Law. Reg.* [*N. S.*] 635. *S. C.* 52 *Penn. R.*)

By the laws of Maryland, a *feme-covert* cannot execute a deed of real property, or dispose of the same, without the consent of her husband, until he has been absent seven years, and unheard from in the mean time; and the statute law is explicit that the husband and wife must join in the conveyance. (*Rhea v. Rheuner*, 1 *Peter's R.* 109. *Lawrence v. Heister*, 3 *Har. & Johns. R.* 371.) And the deed of a married woman will not pass her estate in Maryland, unless her acknowledgment is made according to the form prescribed by statute. (*Lewis v. Waters*, 3 *Har. & McHen. R.* 430.) But if the wife gives a mortgage of lands held in trust for her separate use, though it be not acknowledged as the statute requires in respect to deeds of *femes-covert*, the deed creates a specific lien, which will be enforced in equity. (*Brundage v. Poor*, 2 *Gill & Johns. R.* 1.) The act of Maryland, directing the acknowledgment of the wife as grantor in a deed, is prescribed for her benefit, and a literal compliance with the specified form has never been required. (*Young v. The State*, 7 *Gill & Johns. R.* 253.) But it has been held that a warranty in a deed of bargain and sale, executed by the wife together with her husband, and acknowledged after she was privately examined according to the act of the assembly, will not bind the wife and her heirs. (*Nicholson v. Hemsley*, 3 *Har. & McHen. R.* 409.)

In Virginia, it is laid down as the general rule, that the wife's deed, to be valid, must be executed by the husband also. (*Sexton v. Pickering*, 3 *Rand. R.* 468.) But a conveyance by a husband will pass the entire interest of his wife entitled to a life estate in his lands in the event of his surviving; but if she survives him, it passes only an interest during his life. (*Evans v. Kingsbury*, 2 *Rand. R.* 120.) The deed of a *feme-covert* in Virginia must be acknowledged by her on a private examination apart from her husband; and any court of record in the United States is authorized to take the privy examination and acknowledgment. (*Grove v. Tumbro*, 14 *Gratt. R.* 501. *And vide Tod v. Baylor*, 4 *Leigh's R.* 498.) And the wife must relinquish her equitable as well as legal rights separately and apart from her husband. (*Comets v. Girger*, 1 *Call's R.* 190.) A deed from a husband and wife without her privy examination and relinquishment, is utterly void as to her; and furnishes no consideration to support a subsequent conveyance.

(*Harvey v. Pecks*, 1 *Munf. R.* 518.) But if a *feme-covert* be privily examined, her covenant for further assurance in a deed is obligatory, and a specific execution will be decreed. (*Nelson v. Harwood*, 3 *Call's R.* 384.)

§ 374. In the State of North Carolina, the husband must join his wife in the conveyance of her land, and the wife must be separately examined before the officer. And a deed of husband and wife, when the privy examination of the wife was taken before the acknowledgement of both, is void. (*Gilchrist v. Brice*, 1 *Dev. & Batt. R.* 359. *Vide Davis v. Duke*, 2 *Hayw. [N. C.] R.* 401.)

In South Carolina, the wife conveys her real estate by a deed in which her husband must join in order to make it effectual and valid; and the wife must be privately and separately examined, and thereupon declare that she did freely, voluntarily, and without any compulsion, dread or fear, of any person or persons whomsoever, renounce, release, and forever relinquish unto the grantee, all her interest and estate in the land conveyed. This must all be certified to by the magistrate taking the acknowledgment, and a seal is necessary to be affixed to the certificate, and when such seal is wanting the conveyance is null and void. (*McCreary v. McCreary*, 9 *Rich. Eq. R.* 34. *Vide also Brown v. Shand*, 2 *Rep. Con. Ct.* 12.)

The usage is the same in Alabama with respect to the conveyance by the wife being with the concurrence of her husband, and the private examination of the wife; although it has been held that when the conveyance is for the separate estate of the wife the private examination is not necessary. (*Fisk v. Stubbs*, 30 *Ala. R.* 335.)

So also the custom is substantially the same in the State of Mississippi, and the certificate of the magistrate must show that the conveyance was signed, sealed and delivered by the wife without the fear, threats, or compulsion of the husband. (*Toulmin v. Heidelberg*, 32 *Miss. R.* 268.)

The real estate of the wife is passed in the same way in the States of Georgia and Tennessee. In the latter state, the court has no jurisdiction to inquire into the regularity of the privy examination. (*Campbell v. Taull*, 3 *Yerg. R.* 548. *Lapeter v. Turner*, 1 *ib.* 413.)

In the State of Kentucky, the power of a *feme-covert* to convey land by deed is given by statute, and the deed must be executed

with all the forms required by the statute. The statute provides for the privy examination of the wife, and unless this is made, the deed does not bind her or her heirs. (*Elliott v. Piersol*, 1 *Peters' R.* 328. *Vide also Stule v. Lewis*, 1 *Mon. R.* 49.) The privy examination of the wife by the clerk out of court, is sufficient to pass her title. (*Pendergast v. Gwathmey*, 2 *A. K. Marsh. R.* 67.) And a deed of a husband of land belonging to the wife in her own right, passes his interest therein, but does not work a discontinuance of her estate, nor bar her right to enter upon the land after his death. (*Miller v. Shackelford*, 3 *Dana's R.* 289.)

The wife's equity in land may be conveyed by her and her husband during coverture, by privy examination, and recording the deed in the proper office. (*Whitaker v. Blair*, 3 *J. J. Marsh. R.* 241.) And it would seem that the deed of a *feme-covert* will pass no interest in her land, except in her separate estate, unless her privy acknowledgment is recorded in proper time. (*Whitaker v. Blair*, *supra*. *Hepburn v. Dubois*, 12 *Peters' R.* 345.)

In the State of Indiana, the husband must be a party with the wife to her conveyance in order to pass her estate. (*Scott v. Purcell*, 7 *Blackf. R.* 66.) And, indeed, such is the law in most of the other states not mentioned. As a general rule, where the common law is in force, the real estate of a *feme-covert* is transferred by her deed, in which her husband must join.

In California, the rule is adopted by express statute, and the statute must be complied with. (*Vide Barrett v. Tewksbury*, 9 *Cal. R.* 13. *Kendall v. Miller*, *Id.* 591. *Selvon v. Commercial Co.* 7 *ib.* 266.)

In the State of Ohio, the statute requires the certificate of the separate examination of the wife to her deed to state that the contents of the deed were made known to her. A power of attorney executed by husband and wife, to convey real estate held by them in common, is not obligatory on the wife unless acknowledged by her. (*Bocock v. Pavey*, 8 *Ohio St. R.* 270.)

§ 375. It may be remarked generally that in many of the states the concurrence of the husband in the conveyance of the wife is made necessary by statute; but, except in the new states, these statutes only enacted what had already become law by general usage, or rather the usage had grown out of the requirements of the common law, and hence the statutes may be deemed simply declaratory of the common law. In the new states some regulation was probably

deemed necessary in order to abolish the common law method of conveyance by fine and recovery, and to substitute the conveyance by deed. Hence most of their statutes relating to the subject are in form enabling statutes—enabling married women to convey by deed, but retaining in other respects all the substantial requirements of the common law method of conveyance. (*Vide dissenting opinion in Albany Fire Insurance Company v. Bay*, 4 N. Y. R. 33.)

In the early settlement of this country the common law mode of conveying the lands of married women by fine or common recovery was never adopted by the colonies, but the more simple mode of conveyance by deed was used. This custom became so general at an early period in the colonies, that it became a portion of the general law of the land, and as firmly established as if it had been expressly enacted by statute. (*Id.*)

The deed of a *feme-covert*, conveying her interest in lands which she owns in fee, does not pass her interest by force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity. In such cases an acknowledgment gives no additional effect between the parties to the deed. It operates only as to third persons under the provisions of recording and kindred laws. The law presumes a *feme-covert* to act under the coercion of her husband, unless, before a court of record, a judge, or some commissioner in England, by a separate acknowledgment, out of the presence of her husband, or, in the United States, before some court or judicial officer authorized to take and certify such acknowledgment, the contrary appears. (*Hepburn v. Dubois*, 12 Peters' R. 345.)

In the states generally, except New York, the deed of a *feme-covert* is not valid unless her husband joins in the conveyance. Usually the husband and wife should so join in the conveyance that the husband may convey his estate therein which lasts at least during the coverture, and that the wife may transfer the fee.

§ 376. Upon this subject the learned annotators of Reeve's Domestic Relations say: "The method of passing an estate by fine and recovery is unknown in the laws of most if not all of the United States, and it is only from analogy that it bears to the forms of conveyance usually resorted to for the purpose of divesting the wife of her estate during coverture, that a consideration of the many English cases upon the subject of fines and recoveries becomes

at all important. That a wife during coverture has power to make a contract binding upon herself, is one of the general principles of the law ; but, like nearly all others, it has its exceptions. This, to use a favorite expression of the author, may ‘mar its symmetry,’ but, in general, the line is so distinctly marked to these exceptions as to render them by no means intricate. Thus a wife may, by deed executed with her husband and separately acknowledged, convey her real estate so as to bind herself and her heirs ; and why ? Because it would be highly inconvenient and impolitic that the separate real property of the wife should *ex necessitate*, remain in precisely the situation during the existence of coverture that the marriage found it, when such change might be most beneficial to the interest of the wife and all persons claiming through her. Hence it is that this mode of conveyance is resorted to, as being, by virtue of the separate acknowledgment, the most secure from the coercion of her husband. But when the question of her liability on her covenants of warranty, made during the coverture, comes up, the rule of her inability to contract while a *feme-covert*, comes in to protect her from such covenants. It is believed that the doctrine that a wife may, by deed separately acknowledged from her husband, pass her interest in real estate, obtains generally throughout the United States, and it is somewhat surprising that a branch of the law of husband and wife, of so much importance and of so frequent occurrence as this, should not have been considered by the learned author as worthy of more importance.” (*Reeve’s Dom. Rel.* 3d ed. 199, note 1.) And it may be affirmed as a general rule, that in all of the American States, the real estate of a *feme-covert* is transferred by the conveyance of the wife, acknowledged on a private examination, separate and apart from her husband, which must be certified to by the officer taking the acknowledgment. That though she may thus convey her land, she cannot bind herself or her heirs by any of the covenants contained in her deed ; and that as to her “separate estate” she may execute the conveyance without the concurrence of her husband. But in all other cases, the cardinal principle of the common law is recognized, that a *feme-covert* has no power to contract or dispose of property independent of her husband. Some changes in the rule may be observed when the statutes of the several states respecting the “rights of married women,” are considered.

CHAPTER XXVI.

THE LAW OF DOWER—THE NATURE OF DOWER AND ITS HISTORY—DIFFERENT KINDS OF DOWER—REQUISITES FOR DOWER—MARRIAGE—SEISIN OF THE HUSBAND—DEATH OF THE HUSBAND—ISSUE NOT NECESSARY.

§ 377. DOWER is the estate which the wife has, by operation of law, in the property of her deceased husband, or, more properly, the right which the widow has, in law, to enjoy, for the term of her natural life, a specified portion of the lands and tenements of which her husband was seised during coverture. This applies only to what the law gives the wife independent of any act of the husband, of which he has no power to deprive her.

Some have defined dower to be the provision which was made by the common law for the support of the wife and the nurture of the younger children. (*Gilb. on Dower*, 363. 2 *Black. Com.* 130.) Littleton said: "Tenant in dower is, when a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and takes a wife and dies, the wife, after the death of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds, for the term of her life, whether she has issue by her husband or not, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband." (*Litt.* § 36. *Co. Litt.* 31 a.)

It appears that by the common law the widow has one-third part of the lands and tenements which were her husband's during the marriage (*Gray v. McCune*, 23 *Penn. R.* 447); but by the custom in some places, she may have more or less, and in all cases she is called tenant in dower. The general rule, both in England and in the United States, is to allow the widow an estate for life in one-third of all the lands of which the husband was seised in fee during coverture, although the rule is changed or modified by the statutes of some of the states. Dower is a title *inchoate*, and not consummate until the death of the husband.

§ 378. The origin of dower is involved in considerable doubt and obscurity. The right of dower has been recognized by the customs and laws of every civilized country from a very early age. It was said in one case that "the introduction of dower into Eng-

land is of such antiquity that its origin cannot be traced with any degree of certainty." (*Wright v. Jennings*, 1 *Bailey's Law R.* 277, 278.) In another, that "it is difficult to trace the origin of dower, but all writers admit it to be of great antiquity." (*Hill v. Mitchell*, 5 *Ark. R.* 608, 610.) And in still another case it is said to be "so ancient that neither Coke nor Blackstone can trace it to its origin." (*Combs v. Young*, 4 *Yerg. R.* 218.)

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and the early English writers *dos*, which among the Romans signified the marriage portion which the wife brought to her husband, or the money or property given or settled on a marriage. This species of dower, especially in the middle ages, was often very rich. For instance, the Duke of Brabant contracted his daughter to the Black Prince, son of Edward the Third, A. D. 1339, and gave her a portion, which was reckoned in England of the value of over three hundred thousand pounds sterling; and John Galeazzo Visconte, Duke of Milan, concluded a treaty of marriage between his daughter and Lionel, Duke of Clarence, Edward's third son, A. D. 1367, and granted him a portion equal to two hundred thousand pounds sterling. From this statement, some idea may be had of the wealth of the Flemish and Italian commercial states in those ages. But dower in this sense bears no resemblance to the term as now understood. Dower out of the lands seems also to have been unknown in the early part of the Saxon constitution. In the time of King Edmond, the wife was directed to be supported wholly out of the personal estate. Afterward the widow became entitled to a conditional estate in one-half of the lands, upon condition that she remained chaste and unmarried. Some have ascribed the introduction of dower into England to the Normans, as a branch of their local tenures, though Blackstone did not credit that theory. He thought it possible that it might be in England the relic of a Danish custom; since, according to historians, dower was introduced into Denmark by Swein, the father of Canute the Great, out of gratitude to the Danish ladies, who sold all their jewels to ransom him when taken prisoner by the Vandals. (2 *Black. Com.* 129.) Other writers ascribe the origin of dower in England to the Germans. Chancellor Kent says: "In the customs of the ancient Germans recorded by Tacitus (*De Mor. Germ. c. 18*), *dotem non uxor marito, sed uxori maritus offert*. In this custom we probably have the origin of the

right of dower, which was carried by the northern barbarians into their extensive conquests; and when a permanent interest was acquired in land, the dower of the widow was extended and applied to real estate, from principle and affection, and by the influence of the same generosity of sentiment which first applied it to chattels." (2 *Kent's Com.* 36, note b.) And Mr. Cruise says the estate called dower "is derived from the Germans, among whom it was a rule that a virgin should have no marriage portion, but that the husband should allot a part of his property for her use in case she survived him. * * * And when the Germans established themselves in the southern parts of Europe, and reduced their customs into writing, they fixed the portion of the husband's lands which he might allot for his wife's dower." (1 *Greenl. Cruise*, 152, § 1.)

§ 379. The law of dower appears to have been altered in the reign of King Henry II. In that reign, according to Glanville, every man was bound, both by the civil and ecclesiastical law, to endow his wife at the time of his marriage, either by naming the dower in particular, or by endowing her generally of all his lands. If he endowed her generally, then the wife was entitled to her *dos rationabilis*, which was one-third of her husband's freehold. If he named a dower which amounted to more than a third, it was not allowed, but was reduced to a third. Nor was the wife entitled to dower out of any of her husband's subsequent acquisitions, unless he specially engaged before the priest to endow her of them. And, it is said, these regulations are exactly similar to those contained in the *Grand Coutumier* of Normandy. (1 *Greenl. Cruise*, 152, § 3.)

Mr. Cruise says that nothing is mentioned in King John's Magna Charta, or the first charter of Henry III, respecting dower; but in the charters of 1217 and 1224, it is declared that dower should consist of a third of all the lands which the husband held during his life, unless the wife had been endowed of a smaller portion at the church door. (1 *Greenl. Cruise*, 152, § 4.) But Mr. Scribner says: "This is manifestly an error, for, as we have seen, the right of dower is expressly recognized in both these charters. But it is true that in neither of them is there any thing said as to the *extent* to which the widow might be endowed, and perhaps it is this omission to which that writer refers." (1 *Scribner on Dower*, 13.)

§ 380. But whatever the origin of dower or the date of its introduction into England, Blackstone says that the reason which the English law gives for adopting it is a very plain and sensible one, "for the sustenance of the wife, and the nurture and education of the younger children." (2 *Black. Com.* 130.) Sir Joseph Jekyll says: "The relation of husband and wife, as it is the nearest, so it is the earliest; and, therefore, the wife is the proper object of the care and kindness of the husband. The husband is bound by the law of God and man to provide for her during his life; and after his death the moral obligation is not at an end, but he ought to take care of her provision during his own life. This is the more reasonable, as, during the coverture, the wife can acquire no property of her own. If before her marriage she had a real estate, this, by the coverture, ceases to be hers, and the right thereto, while she is married, vests in her husband. Her personal estate becomes his absolutely, or at least is subject to his control; so that, unless she has a real estate of her own (which is the case of but few), she may by his death be destitute of the necessities of life, unless provided for out of his estate, either by a jointure or dower. As to the husband's personal estate, unless restrained by special custom, which very rarely takes place, he may give it all away from her. So that his real estate, if he has any, is the only plank she can lay hold of to prevent her sinking under her distress. Thus the wife is said to have a moral right to dower." (*Banks v. Sutton*, 2 *P. Wms. R.* 702.) It has been said that the husband's tenancy by the curtesy has no moral foundation, and is therefore called an estate by the favor of the law; but, as Sir Joseph Jekyll well says, dower is not only a legal but also a moral right.

One writer on ancient law says that "the provision for the widow was attributable to the exertions of the church, which never relaxed its solicitude for the interest of wives surviving their husbands—winning, perhaps, one of the most arduous of its triumphs, when, after exacting for two or three centuries an express promise from the husband at marriage to endow his wife, it at length succeeded in ingrafting the principle of dower in the customary law of all western Europe. Curiously enough, the dower of lands proved a more suitable institution than the analogous and more ancient reservation of certain shares of the personal property to the widow and children." (*Maine's Ancient Law*, 224.) Some of the reasons, however, which existed in the earlier ages for

the institution of dower, have disappeared under the usages and refinements of modern society; and yet the estate in dower is still recognized to a greater or less extent by the laws of all Christian nations, and in some of the American States the right has been extended much beyond the provisions of the common law.

§ 381. Anciently there were five kinds of dower, viz.: dower *ad ostium ecclesiæ*, dower by the common law, dower by the custom, dower *ex assensu patris*, and dower *de la plus beall*.

Dower *ad ostium ecclesiæ*, "at the church door," was when a man of the age of twenty-one years, seised in fee simple, took his intended wife to the church door to be married, and after the marriage was solemnized, endowed the woman of the whole land, or of the half or other lesser part thereof, and then openly declared the quantity and the certainty of the land which she should have for her dower. In this case the wife, after the death of her husband, entered into the quantity of land of which her husband endowed her without any assignment or process. (*Co. Litt.* 34 a.) It is said, however, that the widow could never take more than one-third of the lands of which her husband was seised at the time of her espousals, and the husband might endow her with less.

Dower by the common law has been stated in a previous section. (*Ante*, § 377.) Dower by the custom is where a widow becomes entitled to a certain portion of her husband's lands, in consequence of some local and peculiar custom. And in cases of this kind the widow cannot waive the provision thereby made for her and claim dower at common law, because all customs are equally ancient with the common law. (*Co. Litt.* 33 b.)

Dower *ex assensu patris*, "with the father's consent," was when the father was seised of tenements in fee, and his son and heir apparent, when he was married, endowed his wife at the church door of parcel of his father's lands or tenements with the assent of his father, and assigned the quantity and parcels. This species of dower, like that *ad ostium ecclesiæ*, was assigned after the marriage ceremony took place, and was valid without any deed, because the husband cannot make a deed to his wife; besides, she could enter after the death of her husband without any assignment, because the demand of dower was certain in those cases, and no assignment was necessary to fix the quantity of land to which she was entitled. (*Co. Litt.* 34, 35, 37.) This was greatly convenient for the wife, and saved her the delays and vexations of a suit to recover her

dower. Assignment of dower *ad ostium ecclesiæ* or *ex assensu patris* is now abolished by statute in England, and the practice never prevailed in the United States. Dower *de la pluis beall* was an incident of tenure by knight service, and the act which abolished the military tenures, necessarily put an end to this title; it is, therefore, of no practical importance to consider its nature or provisions.

§ 382. Dower by the common law is the only one that prevails in the United States, and is the only species of dower which it is important to consider *in extenso* here. This provision for the widow was introduced into this country upon its first settlement, and was firmly established by some of the earliest colonial acts. The colony act of Massachusetts, in 1641, was the first enactment this side of the Atlantic upon the subject, and that was soon followed by similar statutes in Virginia, New York, and elsewhere; and in most of the United States, the right of the wife to her dower is at present the same as provided by the common law.

There are three requisites to dower at common law; marriage, seisin by the husband, and his death. First, then, the woman must answer the description of a lawful wife, in order to entitle her to this provision; that is, she will not be entitled to dower when she has not contracted a legal marriage. What is a regular and valid marriage in England and in the United States, will be considered hereafter; and in this place it is sufficient to affirm that dower attaches upon all marriages not absolutely void, and existing at the time of the death of the husband. It will not attach, however, if the marriage was absolutely void, as in a case where the husband had a former wife then living. (*Smart v. Whaley*, 6 *Smedes & Marsh. R.* 308.)

A void marriage is at all times a nullity, while a voidable marriage is valid for all civil purposes until, by the judgment of a competent court, its nullity is declared. The woman must have been the wife of a man who, at the time of the marriage, was of sound mind, for a man of an unsound mind is incapable of contracting marriage. Hence, if the husband was of unsound mind at the time of the marriage, dower does not attach. (*Jenkins v. Jenkins*, 2 *Dana's R.* 102.) A person, however, who is married while a lunatic may, on being restored to reason, affirm the marriage, by acts recognizing its validity, without any new solemnization; as when the parties cohabit during the lucid interval of the

husband, he having been fully advised of the marriage, such recognition of the marriage would undoubtedly affirm it, and entitle the wife to all of the rights incident to a valid marriage. (*Vide Cole v. Cole*, 5 *Sneed's R.* 57.)

It was formerly held that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy; but it is at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, and therefore the wife of an idiot is not entitled to dower. (2 *Black. Com.* 130.)

§ 383. An alien widow, by the common law, is excluded from dower, on account of her alienism; and this, although she is the widow of a natural born citizen. (*Mick v. Mick*, 10 *Wend. R.* 379. *Vide also Kelly v. Harrison*, 2 *Johns. Ch. R.* 29. *Sutcliffe v. Forgey*, 1 *Cow. R.* 89. *Alsberry v. Hawkins*, 9 *Dana's R.* 177. *Conolly v. Smith*, 21 *Wend. R.* 59. *Sistare v. Sistare*, 2 *Root's R.* 468.) Generally, however, if an alien widow become naturalized, she may be endowed in all the lands of which the husband was seised during coverture. (*Buchanan v. Deshon*, 1 *Har. & Gill's R.* 289. *Alsberry v. Hawkins*, *supra*. *Priest v. Cummings*, 16 *Wend. R.* 617.) The same rule is applied at common law to the widows of aliens as to alien widows, with respect to their right of dower. (*Sewall v. Lee*, 9 *Mass. R.* 363.) But with respect to alien women, the congress of the United States, in 1855, declared that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States. (10 *Stat. at Large*, p. 604, § 2. *Brightley's Dig.* p. 132, § 2. *Vide Burton v. Burton*, 26 *How. Pr. R.* 474.) It is seen, therefore, that the rule is now uniform throughout the American States that the widow of a *citizen*, whether native or naturalized, is entitled to dower in her husband's land, irrespective of the nativity of the widow.

In those of the United States in which an alien is permitted to hold lands, alienage is no impediment to the title of dower, and in some of the states it is expressly provided that the alienage of the wife shall not bar her title; and in England, by a special act of parliament, it is provided that all women aliens who shall marry by license of the crown, shall be entitled to dower in the same manner as English women; and by another statute, the rights

of natural born subjects are extended to all women aliens married to any natural born subjects or persons naturalized. (7 and 8 Vict. ch. 66. Co. Litt. 3 b, note 9.)

In the States of Arkansas, Delaware, Florida, Georgia, Illinois, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Oregon and Wisconsin, and in the District of Columbia, aliens may, by statute, take, hold, transmit and convey lands in the same manner as natural born citizens, and hence alienage is no impediment to dower.

In the State of Connecticut, any alien who is a resident of the state, or of any of the United States, may purchase, hold, inherit or transmit real estate, and the wife of any alien capable of holding land in the state by devise or inheritance, is entitled to dower in the land of her deceased husband. (*Vide Whiting v. Stevens*, 4 Conn. R. 44.) It would seem, therefore, that alienage, by the Connecticut statute, whether of husband or wife, is no impediment to the wife's dower; and the same is substantially the statute of California.

In the State of Pennsylvania, aliens may hold land to the amount of five thousand acres, as fully as any natural born citizen can; and with reference to such lands, of course, the wife may be endowed, but beyond that the common law doctrine probably obtains.

In the States of Indiana, Texas and California, tenancies by the curtesy and in dower are abolished by statute, with respect to citizens as well as aliens. In California the statute provides that no estate shall be allowed to the husband as tenant by the curtesy, nor any estate in dower be allowed to the wife; but instead of these provisions of the common law, upon the death of either, the survivor takes one-half of the common property of the deceased, and if there are no descendants, the whole goes to the survivor. (*Wood's Dig.* 486-489, §§ 1-13. And *vide Beard v. Knox*, 5 Cal. R. 252.) And the law is substantially the same in Texas. (*Oldham & White's Dig.* 313.) In Indiana the statute abolishes tenancies by the curtesy and in dower; and in case of the death of the husband intestate leaving a widow, one-third of his real estate descends to her in fee simple, free from all demands of creditors, provided it does not exceed in value ten thousand dollars; if it exceeds that sum in value, and does not exceed twenty thousand dollars in value, she has one-fourth; if it exceeds twenty

thousand dollars, then she takes one-fifth; and if his property does not exceed in value three hundred dollars, the whole goes to his widow, whether he dies testate or intestate. In all cases the widow is entitled to three hundred dollars of the deceased husband's personal property, to be selected by her out of its appraised value. In case of the death of the wife, leaving her husband, he is entitled to one-third of her real estate; and if she dies intestate, leaving a minor child or children, one-half of her real estate goes to her husband, and her personal property is divided equally between her surviving husband and children. In case husband or wife dies intestate, leaving no child or children, and no father or mother, the whole estate goes to the survivor. (1 *R. S.* 1862, *ch.* 46, §§ 16, 17, 26.)

In the State of Iowa, alienage is no impediment to dower, provided the parties were, at the death of the husband, residents of the state; and every married woman whose husband dies, capable at the time of his death of acquiring and holding an absolute title to real estate, though she be an alien, is entitled to the same rights of dower as if she were a resident of the state. (*Vide Stemple v. Herminghouser*, 3 *Iowa R.* 408.)

In the State of Kentucky, alienage is no impediment to the wife's dower in any lands acquired by the husband while the parties actually reside in the state, provided they continue to reside in the state until the death of the husband; otherwise the common law of England relating to aliens is in force in the state. (*Vide Hunt v. Warwick*, *Hardin's R.* 61. *Fry v. Smith*, 2 *Dana's R.* 39. *Dudley v. Grayson*, 6 *Mon. R.* 260. *Stevenson v. Dunlap*, 7 *ib.* 143. *Alsberry v. Hawkins*, 9 *Dana's R.* 177. *Moore v. Tisdale*, 5 *B. Mon. R.* 352.)

In the State of Maryland, alien females intermarried with citizens of the United States, and residing therein, become entitled to dower. This is by the statute of 1813, and it has been held that it is limited to residents, and does not apply to alien women who have never resided in the United States during coverture. (*McCreery v. Albender*, 4 *Har. & McHen. R.* 409. *McCreery v. Somerville*, 9 *Wheat. R.* 354. *Owings v. Norwood*, 2 *Har. & Johns. R.* 96. *Buchanan v. Deshon*, 1 *Har. & Gill's R.* 280.)

In the State of New York, the wife of an alien resident dying seised, and an alien woman marrying a citizen, are respectively entitled to dower. (*Laws of* 1845, *ch.* 115.) Under this statute,

however, it has been held that an *alien widow* cannot be endowed of lands of her husband, who was a naturalized citizen of the United States at the time of his death, when the marriage took place prior to the passage of the act, when both husband and wife were *aliens*, and the widow never having been a resident of this country. (*Greer v. Sankston*, 26 *How. Pr. R.* 471.)

In the State of South Carolina, an alien widow of a citizen of the United States is entitled to dower.

In Rhode Island, when the alien is a resident within the state, and has made declaration according to law of his intention to become a naturalized citizen of the United States, the court of probate has power to grant his or her petition to purchase, hold and dispose of real estate, and then the wife is entitled to dower.

In Tennessee, any alien who is a resident of the state, and has declared his intention to become a citizen in conformity to the naturalization laws of congress, may hold real estate in the same manner as a citizen of the United States; and, in that case, alienage is no hinderance to dower.

In the State of Vermont, any person of good moral character who comes to settle in the state, having first taken an oath or affirmation of allegiance to the state, may hold real estate, in which case alienage is no impediment to dower.

In the State of North Carolina the law upon the subject is substantially the same as in Vermont.

In Virginia, the law with reference to holding and enjoying real estate by an alien is about the same as in North Carolina and Vermont, and hence the rule with respect to dower in connection with alienage is substantially the same as in those states.

In the State of Missouri, all aliens residing in the United States who shall have made a declaration on oath of their intention to become citizens of the United States, and all alien residents in the state are capable of holding real estate; and, with this qualification, alienage is no impediment to dower.

In the State of Alabama, alienage is a bar to the wife's right of dower. (*Congregational Church v. Morris*, 8 *Ala. R.* 182. *Vide Etheridge v. Malempre*, 18 *ib.* 565.) And in the State of Mississippi the common law rule relating to aliens in connection with dower substantially obtains. (*For full references to the statutes of the United States upon the subject, vide 1 Scribner on Dower*, 148-174.

It will thus be seen that the common law in respect to the effect

of alienage upon dower, has been greatly modified, or entirely abrogated in most of the American States.

§ 384. In respect to the effect of color upon the question of dower there seems to be considerable doubt. In England, persons of the colored races enjoy equally with the "whites" the privileges of dower; for, by the common law, all women who are natural born subjects, and have attained the age of nine years, are entitled to dower. But in most of the United States there is a distinction, in respect to political privileges, between "white persons" and colored persons of African blood, and in very few of the states do the latter, at present, participate equally with the former in the exercise of civil and political rights. The African race is generally looked upon as essentially a degraded caste, of inferior rank and condition in society. Marriages between them and whites are forbidden in all, or nearly all, of the late slaveholding states, and in some of the states where slavery has not existed for forty years; and when such marriages are not absolutely contrary to law, they are revolting, and regarded as an offense against public decorum. But blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, have always been considered natives, and not aliens. They are what the common law terms natural born subjects, and have always been so recognized by the United States. (*Vide 2 Kent's Com.* 258, note b.)

So, also, the Indians, though natives of the United States, are seldom, if ever, regarded as citizens. They do not possess the rights, nor are they bound to the duties, of citizens. They are governed by the laws and usages of their tribe, and are only subject to the laws of the state where they reside so far as the public safety requires. Each Indian tribe has been uniformly regarded as an independent sovereignty; and yet, in its weak and dependent condition, as the object of protecting care. (*Vide Hastings v. Farmer*, 4 *N. Y. R.* 293, 294. *Dole v. Irish*, 2 *Barb. R.* 639. *The State v. Ross*, 7 *Yerg. R.* 74. *The State v. Managers of Elections*, 1 *Bailey's R.* 215. *Goodell v. Jackson*, 20 *Johns. R.* 693.) And it is generally understood, and in some instances judicially declared, that Africans and their descendants, the copper-colored natives of America, and the yellow or tawny races of the Asiatics, are excluded from the benefits of the naturalization laws of the American congress. It does not follow from all this, however, that the colored races are excluded from all the rights of property;

and virtually, their right to hold and transmit property, both real and personal, is now recognized in all the states. So, however perplexing the question may have been heretofore considered, it is quite certain for the future that no persons of the colored races, who are native born subjects of this country, can be excluded from the privileges of dower.

It seems that the widows of persons attainted, of conspirators, and of absentees, are entitled to dower. (*Sewall v. Lee*, 9 *Mass. R.* 363. *Wells v. Martin*, 2 *Bay's R.* 20. *Mongin v. Baker*, 1 *ib.* 73. *Palmer v. Horton*, 1 *Johns. Cas.* 37. *Cozens v. Long*, 2 *Pennington's R.* 764.)

§ 385. The second requisite to dower at common law is, that the husband should be seised, some time during the coverture, of the estate whereof the wife is dowable. This rule of the common law has been modified by the statutes of some of the states; for example, in many of the states it is necessary that the husband *die* seised. Reference will be made to the changes made in the common law rule hereafter. Though it is required that the husband should be *seised* of the estate, there is no necessity for a seisin in deed, as in the case of curtesy, for a *seisin in law* will be sufficient, otherwise it would be in the husband's power, either by his negligence or his malice, to defeat his wife of that subsistence after his death which the law has provided for her. When the ancestor dies seised, and the heir being married dies without making an actual entry on the lands, his widow is entitled to dower in the lands; for, by the descent of the land upon the heir, he acquired a seisin and freehold in law, though not in deed. (1 *Greenl. Cruise*, 156.) When, however, the husband has only a right of entry during coverture, and does not exercise it before his death, no title to dower arises to his widow; for in such case it cannot be said that the husband had either seisin in law or in deed during the marriage. (*Vide Galbraith v. Greene*, 13 *Serg. & Rawle's R.* 85.) A widow can recover dower only upon the strength of her husband's title. She must show a *seisin* in him during coverture. (*Poor v. Horton*, 15 *Barb. R.* 485.) And in order that dower arise, the husband must have been seised, during the marriage, of a present freehold interest, and not of a remainder in the land. (*Pretts v. Richey*, 29 *Penn. R.* 71.) In a word, to entitle a widow to dower, the husband must have been seised, either in fact or in law, of an estate of inheritance in the land at some time during

coverture. This rule is inflexible. Simply a reversion in fee, or a vested remainder expectant upon estate for life, is not sufficient. (*Durando v. Durando*, 23 *N. Y. R.* 331.) But though the seisin at law of the husband without actual entry will entitle the wife to dower, this seisin at common law must be of a legal and not an equitable estate. (*Godwin v. Winsmore*, 2 *Atk. R.* 526.) However, in some of the states the widow is entitled by statute to dower out of the equitable estates in lands of which the husband was the owner, in the same manner as in the legal estates of which the husband died seised or possessed. This is the rule in Virginia, Tennessee, Maryland, Illinois, and perhaps others of the states. In Kentucky it is declared by statute that the wife shall have dower of real estate, although there may have been no actual possession, or recovery of possession, by the husband in his life-time. (2 *R. S. art. 2, ch. 47.*)

Lord Coke lays it down that of a *seisin for an instant* a woman shall not be endowed. Sir William Blackstone explains this position thus: "The seisin of the husband for a transitory instant only, when the same act which gives him the estate conveys it also out of him again, as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine, such seisin will not entitle the wife to dower, for the land was merely *in transitu*, and never vested in the husband, the grant and render being one continued act. But if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof." (1 *Co. Litt. ch. 5, § 36.* 2 *Black. Com.* 131. *Broughton v. Randall*, *Cro. Eliz.* 503.) When the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money in whole or in part, dower cannot be claimed as against rights under the mortgage. The husband is not deemed sufficiently or beneficially seised by an instantaneous passage of the fee out of him to entitle his wife to dower as against the mortgage. (*Mayburry v. Brien*, 15 *Peter's R.* 21.) The doctrine that of a seisin for an instant a woman shall not be endowed, seems to be well established in this country. (*Holbrook v. Finney*, 4 *Mass. R.* 566. *Clark v. Muroe*, 14 *ib.* 352. *Slow v. Tift*, 15 *Johns. R.* 485.) But the court say in one case: "Perhaps there is no general rule, in strictness, that in cases of instantaneous seisin the widow shall or shall not be entitled to dower. * * * When a man has the

seisin of an estate beneficially for his own use, the widow shall be endowed." (*McCauley v. Grimes*, 2 *Gill & Johns. R.* 324.) What may be a beneficial seisin in the husband, so as to entitle his widow to dower, may be a matter of controversy, and must lead to some uncertainty. It has been held, where a man conveyed land to one who at the same time conveyed the same land to another, that the widow of the first grantee was entitled to dower in the land conveyed. (*Stanwood v. Dunning*, 2 *Shepley's R.* 290.) But more of this when the nature and qualities of the property subject to dower is considered. By the dower act now in force in England, the widow may claim dower when the husband has had only a right of entry or action; but the dower must be sued for or obtained within the period during which the right of entry or action might be enforced. (3 and 4 *Will. IV. ch.* 105, §§ 2, 3.) But the principle is well settled by the common law that the wife's right of dower attaches only to the beneficial seisin of the husband.

§ 386. The last circumstance required to the existence of an estate in dower is the death of the husband, by which the wife's estate is consummate. It is generally understood that nothing but the natural death of the husband will give a title to dower, though there are some old authorities to prove that the wife of a man banished by abjuration, or by act of parliament, which is a civil death, would be entitled to dower. But the civil death of the husband by his entry into religion had not this effect.

When it was uncertain whether the husband was dead, as when he was absent beyond seas, and no intelligence of him could be obtained, it seems that the wife might recover dower conditionally. (1 *Bright's Husband and Wife*, 325.) Reputation in the family is *prima facie* evidence of the death of the husband. (*Cochrane v. Libby*, 6 *Shepley's R.* 39.) So, in general, is the granting of letters of administration evidence of such death. (*Thompson v. Donaldson*, 3 *Esp. R.* 63. *Succession of Hamblin*, 3 *Rob. [La.] R.* 130. *Newman v. Jenkins*, 10 *Pick. R.* 515. *Moore v. De Bernales*, 1 *Russ. R.* 301.) But a treatise on evidence may be consulted as to what is competent proof of the death of the husband, and as to the presumption of survivorship when two persons perish by the same calamity. (*Vide* 1 *Greenl. on Ev.* §§ 29, 30, 41, 550. Also *Taylor v. Dipack*, 2 *Phill. R.* 261. *Colvin v. Procurator-General*, 1 *Hagg. Eccl. R.* 93. *In re Murray*, 1 *Curt.*

R. 596. *Satterthwaite v. Powell*, *Ib.* 705. *Sillick v. Booth*, 1 *You. & Col. Cas.* 121.)

§ 387. The birth of issue is not required in order to give a right to dower, as it is in order to found a right to curtesy. But the widow will not be entitled to dower unless her issue could by possibility have inherited the estate. If, therefore, a man seised of lands in fee simple have a son by his first wife, and after her death marry a second, she will be entitled to dower of his lands, for her issue might, by possibility, have been heir to and inherited the estate after the son's death.

It is laid down by Lord Coke that if the wife is past the age of nine years at the time of her husband's death, she will be endowed, although her husband be but four years old. It is observed that though a woman cannot consent to marriage before twelve years, nor a man before fourteen, yet this inchoate and imperfect marriage, from which either of the parties may, at the age of consent, disagree, shall entitle the wife to dower. (*Co. Litt.* 33.) The law did not deem it necessary that the woman should be nine years old at the time of marriage, for if she were then of the age of seven years only, and survives nine at the husband's death, she would be entitled to dower, the law supposing her capable from that period of having heritable issue. The wife will be entitled to dower however far advanced in years she may be at the time of her marriage, because the law cannot fix upon the precise period when her capability of having issue determines. Lord Coke mentions an instance of a woman having a child after she attained her sixtieth year. The law sets no bounds to the possibility of having issue at the most advanced age, for the reason, as Lord Coke said: "Seeing that women in ancient times have had children at that age whereunto no woman doth now attain, the law cannot judge that to be impossible which by nature was possible; and in my time a woman above threescore years old hath had a child, and *ideo non definitur in jure.*" (*Co. Litt.* 40 a.)

Upon this subject, Mr. Scribner very properly remarks in the light of authority, that "it is believed not to be essential to the right of dower in any case that the wife should be physically capable of bearing children. Dower is a right incident to marriage, and at this day the possibility of having issue can hardly be regarded as a prerequisite to the inception of the estate. If, by the law of the place where the marriage is contracted, the wife is

competent to enter into that contract, and the marriage be valid in other respects, the necessary effect would seem to be to clothe her with *all* the rights pertaining to the marital relation. And if the marriage remain undissolved during the life of the husband, it seems clear that the widow would be entitled to dower, even though it were rendered absolutely certain that, by reason of physical malformation, or other cause, she was utterly incapable of bearing children." (1 *Scribner on Dower*, 217, referring to 1 *Washburn on Real Property*, 153.)

CHAPTER XXVII.

OF WHAT PROPERTY THE WIFE IS DOWABLE—DOWER IN LANDS—DOWER IN MINES AND ORE-BEDS—PARTNERSHIP LANDS—EXCHANGE OF LANDS—LANDS PARTITIONED—MORTGAGED LANDS—REVERSIONS AND REMAINDERS—TRUST ESTATES—EQUITABLE ESTATES—LANDS APPROPRIATED TO PUBLIC USES—SUMMARY.

§ 388. WITH respect to the description of the property which is subject to dower, it may be affirmed, in general terms, that, at the common law, dower may be claimed out of all lands whereof the husband was seised *in fee simple*, at any time during the coverture, and out of all incorporeal hereditaments that savor of the realty, or which issue out of corporeal ones, or which concern or are annexed to or may be exercised within the same, as rents, estovers, common appendant woods, mills, piscaries and the like. (2 *Black. Com.* 131.) The widow is not entitled to dower out of all her husband's incorporeal hereditaments of what nature soever, but only out of such incorporeal hereditaments as savor of the realty. (*Buckridge v. Ingram*, 2 *Ves. Jun. R.* 664.)

The widow is dowable of all mines wrought during the coverture, whether by the husband, or lessees for years; whether paying pecuniary rents, or rents in kind; and whether the mines are under the husband's own lands, or have been absolutely granted to him, to take the whole stratum in the land of others; and dower may be assigned of mines, either collectively with other lands, or separately of themselves. (*Stoughton v. Leigh*, 1 *Taunt. R.* 402.) This is correct in respect to mines opened during coverture, but as to

mines in general, including beds of iron ore, if they are unopened at the time of the owner's death, his widow must take her dower in other land merely. The newly opening a mine is waste, and the widow, having only an estate for life, can legally do no act which injures the inheritance. All the cases agree in this. (*Vide Coates v. Cheever*, 1 Cow. R. 460, 474.) Where a man died seised of a tract of land of four acres, consisting of a slate quarry partially above ground, a small portion of which had been worked at the usual depth, the whole quarry was held to be opened, and therefore subject to dower. (*Billings v. Taylor*, 10 Pick. R. 460.) And it has been held that a tenant in dower of coal lands, may take coal to any extent from a mine already opened, or sink new shafts into the same veins of coal, or dig into a new seam through one already opened above it. (*Cranch v. Puryear*, 1 Rand. R. 258.) In North Carolina, the widow has no authority to make turpentine unless it had been done by the husband; but if her husband had done so, then she may use trees already *boxed* in his life-time, or box new ones, not exceeding the amount of turpentine obtained when dower was assigned. (*Carr v. Carr*, 4 Dev. & Batt. R. 179.)

Of a mere annuity granted to the husband and his heirs, the widow will not be entitled to dower, because it is a personal demand only, a mere charge upon the person of the grantor, and does not issue out of any lands or tenements. (*Earl of Stafford v. Buckley*, 2 Ves. Sen. R. 170. *Aubin v. Daly*, 4 Barn. & Ald. R. 69. *Holderness v. Carmarthen*, 1 Bro. C. C. 377.)

When real estate is purchased for the use of a commercial partnership, and paid out of the proceeds of the partnership, and conveyed to one of the partners, although he will have the legal interest, the estate will, in equity, be converted into personalty, and his widow will not, therefore, be entitled to dower out of his share. So if in such a case the estate was conveyed to the partners as tenants in common, their widows have no right to be endowed out of their respective shares. (*Thornton v. Dixon*, 3 Bro. C. C. 19. *Ripley v. Waterworth*, 7 Ves. R. 425.) It was formerly doubtful whether, in the absence of any agreement between the partners, that real estate purchased with partnership funds, should be sold on the dissolution of the partnership, the circumstance that the land was bought for the purposes of the partnership would convert it into personalty as between the representatives of a partner. But it now seems to be well settled that real estate purchased with

partnership property for partnership purposes, is to all intents and purposes to be considered as personalty, and therefore the wives of the partners have no right of dower in such lands. (*Selkraig v. Davies*, 2 *Dow. R.* 242. *Phillips v. Phillips*, 1 *Mylne & Keen's Ch. R.* 649. *Hale v. Plummer*, 6 *Ind. R.* 121. *Galbraith v. Gedge*, 16 *B. Mon. R.* 634.) But the land will not become personalty unless it is purchased for the purposes of the partnership trade. (*Randall v. Randall*, 7 *Sim. R.* 271.) Nor will it become personalty, if, although used for partnership property, it is not necessary that it should be sold for the purposes of the partnership, unless it has been treated by the partners as partnership property. (*Cookson v. Cookson*, 8 *Sim. R.* 529. *Houghton v. Houghton*, 11 *ib.* 491.) In one case where real estate was purchased for the purposes of a partnership, and paid for out of joint effects, but by the agreement between the partners, it was to become the separate property of one of them, to whom it was conveyed, and he was to be a debtor to the partnership for the purchase-money, his wife was held entitled to dower of the whole. (*Smith v. Smith*, 5 *Ves. R.* 189. *And vide Greene v. Greene*, 1 *Ohio R.* 244.)

It may be affirmed that estates held by partners may or may not be liable to dower, according to the circumstances of each case. Whenever real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them and their respective heirs in trust for the purposes of the partnership, until those purposes are accomplished. Until then, the land has in equity all the attributes of personal property, held in partnership and in trust; and the widow of a deceased partner cannot have dower until the claims of the partnership creditors and of the surviving partner are adjusted and settled. (1 *Greenl. Cruise*, 180. *Dyer v. Clark*, 4 *Met. R.* 562, 579, 580. *Sigourney v. Munn*, 7 *Conn. R.* 11. *Hoxie v. Carr*, 1 *Sumner's R.* 173. *Crawshay v. Maule*, 1 *Swanst. R.* 495, 522. *Broom v. Broom*, 3 *Mylne & Keen's R.* 443.)

§ 389. It may happen from the nature of the property and the different kinds of remedies given for the recovery of it, that it will be considered either a real or a personal inheritance, at the election of the heir, so as to place the widow's right of dower in his power. The right to dower may also depend on the election of a third person. If, previously to the title of dower attaching, the husband

has by contract given to the tenant of another the option of purchasing the estate, the exercise of that option either before or after the husband's death, will, at common law, convert the estate into personalty, and defeat the widow's right to endowment. (*Townley v. Bidwell*, 14 *Ves. R.* 591.) The widow is *prima facie* entitled to be endowed of a rent-charge; but if, before distress and avowry made, her husband die, and the heir brings his writ of annuity and recovers judgment in it, or proceed no further than filing a declaration, the heir's election is barred and the rent-charge will be converted into a mere personal annuity, in which the widow cannot claim dower, for the lands are forever discharged from the real remedy by distress. These are examples when the widow's right to endowment is sometimes in the power of the heir or a third person. (*Co. Litt.* 144, 145.)

When the husband has exchanged lands, the wife will not be dowerable both of the lands given and taken in exchange, but she will be permitted to elect out of one of the two estates, because her husband was seised of both during coverture. (*Co. Litt.* 31. 1 *Greenl. Cruise*, 163. *Butler's case*, 3 *Leon. R.* 271. 1 *Washb. Real Prop.* 158, § 11.)

The doctrine of the common law in regard to the exchange of lands does not prevail in all of the American States. Indeed the rule in a majority of the states is that when lands are exchanged, both parties are regarded as ordinary purchasers, and in such case, of course, the widow's right of dower attaches to both the land conveyed and the land received in exchange. (*Vide* 1 *Scribner on Dower*, 272. *Cass v. Thompson*, 1 *N. H. R.* 65.) The common law rule upon the subject is recognized in the States of New York, Wisconsin, Arkansas, Michigan, Illinois, Kentucky, Minnesota, and Oregon, and perhaps in some others, in all of which the right of dower is limited, upon the exchange of lands, to the estate in only one parcel, to be elected by the widow. The rule of the common law upon the subject also prevails in the District of Columbia. (*Vide the statutes of the several states.*)

It is important, however, in this connection, to understand the meaning of an exchange in the legal acceptation of the term. An exchange is defined by Blackstone to be "a mutual grant of equal interests, the one in consideration of the other. * * * The estates exchanged must be equal in quantity, not of *value*, for that is immaterial, but of *interest*, as fee simple for fee simple, a lease

for twenty years for a lease for twenty years, and the like." (2 *Black. Com.* 223.) And when the common law rule is adopted by the statute of any state, the conclusion is that it was adopted with reference to the common law definition of this species of conveyance. (*Wilcox v. Randall*, 7 *Barb. R.* 633, 639.)

But if, for a valuable consideration, the division of lands held in common by two or more parties is *purposely* made in unequal parts, the widow will not be limited in her right of dower to the part which was released to her husband. (*Mosher v. Mosher*, 32 *Maine R.* 412.)

§ 390. If, at common law, the husband seised of a rent-charge in fee, purchase the inheritance of the lands out of which the rent issues, his widow must elect of which she will be endowed. And if the husband make a feoffment in fee, reserving a rent, she must elect to be endowed either of the lands or of the rent; and if she make a choice of the former, she will hold them discharged of the latter. (*Perkins on Conveyancing*, §§ 320, 324.)

As the period for the wife to make her election in these cases is at her husband's death, and not sooner, it has been determined that if she and her husband exchange her lands for others, and then they convey away by deed and fine the lands taken in exchange, she will nevertheless be at liberty to enter upon her own estate after her husband's death. (*Anonymous*, 1 *Leon. R.* 285.) But this would not be the case if the lands exchanged were conveyed in the manner by which the separate lands of a wife may be legally transferred.

If the husband were seised in fee, and conveyed away the estate, and then took it back again in fee or in tail, the widow may elect whether she will be endowed upon the first or second seisin, the exercise of which may be of material consequence to her. (*Co. Litt.* 33.) But the right of election hereinbefore noticed, has no application at the present day in England, for the reason that by statute, no widow is entitled to dower out of any land which shall have been absolutely disposed of by her husband in his life-time or by his will. (3 and 4 *William IV*, *ch.* 105, § 14.) The dower of the wife is therefore defeated by her husband's alienation, and in several of the American States it is necessary that the husband *die* seised of the lands in order that dower may attach. This is the rule in Connecticut, Vermont, North Carolina, Tennessee, Georgia, Mississippi, New Hampshire, and possibly in some others, although

it is quite certain that in most of the remaining states the rule of the common law, that seisin *during* coverture is sufficient, is still retained.

§ 391. In some of the states the law expressly excludes wild and uncultivated lands from the operation of dower. Thus, in the State of Massachusetts it is provided by statute that "a widow shall not be endowed of wild lands of which her husband shall die seised, nor of wild lands conveyed by him, although they should be afterward cleared; but this shall not bar her right of dower in any wood lot, or other land used with the farm or dwelling-house, although such wood lot or other land should never have been cleared." (*Gen. Stat.* 1860, *ch.* 90, § 12.)

Upon this subject, Chief Justice Parker said, in one case before the supreme judicial court: "By the common law, the widow is dowable of all the real estate of which her husband was seised during coverture, with the exception only of a castle erected for public defense, of a common in gross, and some other kinds of estate not known in this country. The question whether forests, parks, and other property of a similar nature, are also exceptions, seems never to have occurred; probably because there is no instance in Great Britain of any such property held separately and distinct from improved and cultivated estates. In this country, on the contrary, there are many large tracts of uncultivated territory owned by individuals who have no intention of reducing them to a state of improvement, but consider them rather the subject of speculation and sale, or as a future fund for their prosperity, increasing in value with the population and improvements of the country. If dower could be assigned in estates of this nature, the views of those who purchase such property would be obstructed; and an impediment to their transfer would be created, and in many instances the inheritance would be prejudiced without any actual advantage to the widow, to whom the dower might be assigned. For, according to the principles of the common law, her estate would be forfeited if she were to cut down any of the trees valuable as timber. It would seem, too, that the mere change of the property from wilderness to arable or pasture land, by cutting down the wood and clearing up the land, might be considered waste; for the alteration of the property even if it became thereby valuable would subject the estate in dower to forfeiture; the heir having a right to the inheritance in the same character it was left

by the ancestor. * * There would seem, then, to be no reason for allowing dower to the widow in property of this kind. If she did not improve the land, the dower would be wholly useless; if she did improve it she would be exposed to disputes with the heir, and to the forfeiture of her estate after having expended her substance upon it. * * Upon the whole, seeing no possible benefit to the widow from an assignment of dower in such property; and, on the contrary, believing that it would operate as a clog upon estates designed to be the subject of transfer; and finding that the principles upon which the estate of dower rests at common law are not applicable to a case of the kind before us, we feel constrained to say that the demandant cannot sustain her action." (*Conner v. Shepherd*, 15 *Mass. R.* 164.)

It has also been held that the widow is not dowable of lands which were alienated by the husband when they were in a state of nature, though at the time of his death were cultivated and made tillable as a farm, but altogether by the labor of the grantee of the husband or those who claimed under him. (*Webb v. Townsend*, 1 *Pick. R.* 21.)

But the widow is entitled to dower in woodland which is used as an appendage to the dwelling-house and cultivated land, for the purpose of procuring fuel and timber for repairs. (*White v. Willis*, 7 *Pick. R.* 193. *Shattuck v. Gregg*, 23 *ib.* 88. *But vide White v. Outler*, 17 *ib.* 248.)

In the State of Maine the same rule prevails upon this subject as in Massachusetts; the statute is precisely similar, and the authorities, so far as the question has been involved in the cases, agree in all respects with the decisions of the Massachusetts courts. (*R. S.* 1857, *ch.* 103, § 2. *Mosher v. Mosher*, 3 *Shep. R.* 371. *Durham v. Angier*, 20 *Maine R.* 242. *Khun v. Kaler*, 2 *Shep. R.* 409. *Stevens v. Owen*, 12 *ib.* 94.) And in the State of New Hampshire the statute upon the subject is substantially the same as the statutes of Massachusetts and Maine. (*Comp. Laws of 1853*, *ch.* 175, §§ 4, 5. *Vide Johnson v. Perley*, 2 *N. H. R.* 56.)

§ 392. In all or nearly all of the remaining states, where the right of dower has not been abolished by statute, dower is allowed in all the lands of the husband, whether in a state of nature or improved. In a case before the courts of Virginia, Judge Roane said: "In considering what is waste in this country, it is to be remarked that the common law, by which it is regulated, adapts

itself in this, as in other cases, to the varied situation and circumstances of the country. That cannot be waste, for example, in an entire woodland country which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land in such circumstances would not be a lasting damage to the inheritance, nor a disinherison of him in the remainder, which is the true definition of waste. It would, on the contrary, be beneficial." (*Findlay v. Smith*, 6 *Munf. R.* 134. *Vide also Macauley v. Dismal Swamp Company*, 2 *Robinson's R.* 507.)

In an early case in Ohio, in which the question was presented, the court said: "The second question in what seems to the court the appropriate order for considering the points in the case is, can the widow claim to be endowed of lands lying wild and uncleared of timber, during the husband's seisin, and at the time of the alienation? This question is raised upon a technical nicety of the common law. One of the incidents attached to a dower estate is its forfeiture for waste, and a prominent act of waste is converting woodland into arable. Thus, it is argued, dower in wild land is a useless property. It can be of no value to the widow in its wild state, and it cannot be reduced to cultivation without forfeiting the estate itself. This argument is too subtle to be received as premises for the conclusion it seeks to enforce. The common law doctrine of waste has never been recognized in Ohio, either as an incident of title, or as affording a remedy for wrong." (*Allen v. McCoy*, 8 *Ohio R.* 418.) This is still the doctrine in the State of Ohio. And the same doctrine prevails, certainly, in the States of New York, Michigan, Illinois, Kentucky and Georgia; and, with some little qualification, in Rhode Island, Pennsylvania, North Carolina, and Tennessee. (*Vide Walker v. Schuyler*, 10 *Wend. R.* 480. *Campbell, Appellant*, 2 *Doug. [Mich.] R.* 141. *Schnebly v. Schnebly*, 26 *Ill. R.* 116. *Hickman v. Irvine*, 3 *Dana's [Ky.] R.* 121. *Chapman v. Shroeder*, 10 *Geo. R.* 321. *Pub. Laws of R. I.* 1844, p. 188, § 2. *Hastings v. Crunkleton*, 3 *Yeates' [Penn.] R.* 261. *Ballantine v. Poyner*, 2 *Hayw. [N. C.] R.* 110. *Parkins v. Cox*, *Id.* 339. *Wilson v. Smith*, 5 *Yerg. [Tenn.] R.* 379. *And vide Combes v. Young*, 4 *ib.* 218. *Owen v. Hyde*, 6 *ib.* 334.)

Mr. Scribner says upon this question: "In the absence of any express legislation on the subject, the question whether a widow

is dowable of wild lands; depends very much upon the extent to which the courts have gone in adopting the rigid rules of the common law respecting the doctrine of waste. In several of the older states the common law is held to be in force. In others, and perhaps in a majority of them, the strict rule obtaining in a highly cultivated country like England, is considered inapplicable in a comparatively new and unsettled country like ours, and is therefore received with such modification as properly adapts it to the condition of things existing with us. And it may be here stated as a general principle, that in those states where a tenant for life is authorized, either by express statute, or by a judicial exposition of the law of waste, to clear a reasonable proportion of wild lands and fit them for cultivation, a widow is entitled to be endowed of such lands, and to exercise therein all the rights and privileges commonly permitted to tenants for life." (1 *Scribner on Dow.* 202, citing 1 *Hilliard's Real Prop.* 2d ed. 141, § 22.)

It has been held in New York and Virginia, however, that, as a general rule, when the lands are alienated by the husband in his life-time, the widow's dower is assigned according to the value of the lands at the time of alienation, and not at the time of the death of the husband, unless the lands have decreased in value since the alienation. (*Vide Tod v. Baylor*, 4 *Leigh's R.* 493. *Humphrey v. Phinney*, 2 *Johns. R.* 484. *Dorchester v. Coventry*, 11 *ib.* 510. *Walker v. Schuyler*, 10 *Wend. R.* 480. *Dibble v. Clapp*, 31 *How. Pr. R.* 420.) But in other states it is held, on the contrary, that when the land has increased in value, not by the labors of the heir, or of the purchaser, but from extrinsic and collateral causes, as the increasing prosperity of the country, the erection of manufactories or other improvements in the neighborhood, the wife shall have the benefit of such increased value, or, in other words, the value at the time of allotment, excluding the purchaser's improvements, and such seems to be the current of authority on the subject. (*Vide Dunseth v. Bank of United States*, 6 *Ohio R.* 76. *Allen v. McCoy*, 8 *ib.* 418. *Dashill v. Collier*, 4 *J. J. Marsh. R.* 603. *Taylor v. Broderic*, 1 *Dana's R.* 348. *Lawson v. Morton*, 6 *ib.* 471. *Smith v. Addleman*, 5 *Blackf. R.* 406. *Green v. Tennant*, 2 *Harring. R.* 336. *Mosher v. Mosher*, 15 *Maine R.* 371. *Gore v. Brasier*, 3 *Mass. R.* 544. *Powell v. Mons. & Brim. Man. Co.* 3 *Mason's R.* 374, 375. *Thompson v. Morrow*, 5 *Serg. & Rawle's R.* 289. *Shirtz v. Shirtz*, 5 *Watt's R.* 255.) But in New York and

Virginia, the opposite rule has been adopted, and the widow is confined strictly to the value, at the time of alienation.

§ 393. In cases of partition of lands held in common, the statutes of all or nearly all of the states, prescribe the form and effect of all of the proceedings, and as a general rule it may be affirmed, that the widow's dower attaches to the share allotted to her husband, the same as in cases of an exchange of lands. Partition of an estate owned by tenants in common may be made by deeds of release as well as by deeds of partition, and by process of law. Where a simple partition of a common estate is made, the right of the widow of each tenant to claim dower, may well be restricted to the share assigned or conveyed to her husband. That must be presumed to have been of equal value to the husband's share of the whole estate. If partition be not made by assigning or conveying to each his own share, and the estate is conveyed in unequal shares of unequal values, and especially when other considerations beside that of a division of the common estate occasion the conveyances, no principle is perceived; or authority found, limiting the right of the widow to a claim of dower only in the portion conveyed to her husband. (*Vide Mosher v. Mosher*, 32 *Maine R.* 412.) But when lands held in common are legally partitioned by proceedings at law or in equity, or by equal partition deeds between the parties, the wife's dower attaches only to the husband's share in severalty; though in cases of legal partition the wife should be made a party to the proceedings. (*Potter v. Wheeler*, 13 *Mass. R.* 504. *Lloyd v. Conover*, 1 *Dutch. R.* 47. *But vide Lee v. Lindell*, 2 *Missouri R.* 202, 206.) However, if the tenant in common conveys his interest, and the grantee in the life-time of the husband obtains partition of the lands, the dower of the wife will be assigned as though no partition had been made. (*Rank v. Hanna*, 6 *Ind. R.* 20.) Partition of lands among co-devisees does not deprive the wife of one of the devisees of her inchoate right of dower in a parcel set off to another, though equity will make all contribute to make the latter good. (*Walker v. Hall*, 15 *Ohio St. R.* 355.)

§ 394. In case the joint property cannot be divided or partitioned without great prejudice to the owners, or from its situation it cannot be consistently divided into the requisite number of equal parts, the property has to be sold, and the proceeds divided among the parties; and a sale made in conformity to the statute, divests the contingent right of dower of the wife of a co-tenant, and

passes the entire estate absolutely to the purchaser. In such a case, however, it is the duty of the court under whose direction the sale is made, to require a proper portion of the husband's share of the money to be safely invested for the benefit of the wife, in case she survives her husband, and her right of dower becomes absolute. (*Jackson v. Edwards*, 7 *Paige's Ch. R.* 391. *Wilkinson v. Parish*, 3 *ib.* 653. *Lee v. Lindell*, 2 *Mo. R.* 202. *Weaver v. Gregg*, 6 *Ohio St. R.* 547. *Bartlett v. Van Zandt*, 4 *Sand. Ch. R.* 396.) But this may depend upon the terms of the statute under which the sale of the land is made. (*Vide Warren v. Twilley*, 10 *Md. R.* 39.) The question, under the New York statute, was for some time in doubt; and in one case it was held that the act of the husband in subjecting his wife to a partition suit, nor a judgment or decree rendered therein without her assent evidenced in the manner pointed out by law, did not have the effect of barring her right of dower. (*Matthews v. Matthews*, 1 *Edw. Ch. R.* 565.) But the question is now settled in New York the other way. In the first case before the chancellor involving the question, he reasoned thus: "That it was the intention of the revisers to enable the courts to give to a purchaser under the judgment or decree, where a sale of the premises was found to be necessary, a perfect title as against every portion or contingent interest in any undivided share of the property, is evident from the note which they appended to the new provisions introduced by them in relation to incumbrances on such shares. Indeed, without such a power, it would be very difficult to make the partition equal in the case of a sale, as a contingent right of dower or other defect in the title as to one share in the property must, upon a sale, necessarily diminish the amount bid for all the shares collectively. The same difficulty, therefore, would exist in determining the value of a wife's inchoate right of dower in the undivided share of her husband, for the purpose of dividing the proceeds of the sale among the different tenants in common according to equity, as is apprehended by the counsel to exist in making a suitable provision for this contingent right of the wife, out of the whole of the proceeds of her husband's share of the sale, if she chose to insist upon her right to such a provision. And, in addition to that, the fact that the title in the hands of the purchaser would be incumbered with a contingent right of dower of a *feme-covert*, in an undivided share of the premises, which might subject the owner to future expense and

litigation, would diminish the value of the property in the hands of the purchaser to more than double the actual value of such contingent right." (*Jackson v. Edwards*, 7 *Paige's Ch. R.* 391, 406, 407.) But the case was carried by appeal to the court of errors, where the decree of the chancellor was unanimously affirmed, without, however, passing upon the question whether the inchoate right of dower of the wife would be barred by a sale of the lands in a partition suit, as argued by the chancellor. Judge Bronson, who delivered one of the opinions of the court, doubted whether the wife would be barred, and questioned the authority of the court to direct investments for her indemnity; while Senator Verplanck, who delivered the other opinion, concurred in the views of the chancellor. (*Jackson v. Edwards*, 22 *Wend. R.* 498.) But the law is now well settled in New York that when the joint premises cannot be partitioned without great prejudice to the owner, so that a sale becomes necessary, the purchaser will hold the land purchased by him, free and discharged from the dower interest, provided the doweress has been made a party to the suit. (*Tanner v. Niles*, 1 *Barb. R.* 560.)

In Pennsylvania it has been decided to be elementary law in that state, that the dower interest a widow has in her husband's lands is not changed into personalty by proceedings in partition, but that it retains its character of realty. (*Manor's appeal*, 51 *Penn. R.* 375.)

§ 395. When the lands of the husband are mortgaged in fee before the marriage, or by the husband and wife after the marriage, the legal estate is regarded as still in the mortgagor, as to all persons except the mortgagee and his assigns; and therefore the wife is held dowable in the lands mortgaged. The equity of redemption in such lands, before entry or foreclosure, is equivalent to the estate in fee, descendible by inheritance, devisable by will and alienable by deed. The widow is entitled to dower therefore in an equity of redemption, as well when the mortgage was executed before marriage, as when it is executed by the husband and wife during coverture. And as against the mortgagee and those claiming under him, she is entitled in equity to redeem, upon payment of the mortgage debt. No act, deed, or conveyance of the husband or judgment or decree confessed by or recovered against him, will prejudice the wife's right of dower. A purchaser under a decree of foreclosure and sale in equity, in the life-time of the husband,

when the wife is not made a party, takes the estate subject to her equity of redemption. In order to bar her right to redeem she is a necessary party to the foreclosure suit; and then if there are surplus moneys in court arising from the sale of the mortgaged premises, she is entitled, as against judgment creditors, to have the amount of her dower, being, in New York, one-third, invested for her benefit and kept invested during the joint lives of herself and her husband, and during her own life in case of her surviving her husband, as and for her dower in such surplus money. This is upon the assumption that land has been sold in which the wife had a legal interest which was not required to pay the mortgage debt, and therefore upon the principle of equitable conversion, the proceeds, so far as it respects her, must be regarded as real estate. (*Denton v. Nanny*, 8 *Barb. R.* 618, 623, 624, 626. *Vartie v. Underwood*, 18 *ib.* 561, 564. *Mills v. Van Voorhis*, 23 *ib.* 125. *S. C.* 20 *N. Y. R.* 412, 416. *Vide also Titus v. Neilson*, 5 *Johns. Ch. R.* 452. *Newton v. Cook*, 4 *Gray's R.* 46. *Bell v. The Mayor of New York*, 10 *Paige's Ch. R.* 49. *Lewis v. Smith*, 11 *Barb. R.* 152. *Smith v. Eustis*, 7 *Greenl. R.* 41. *Carll v. Butman*, *Ib.* 102. *Cass v. Martin*, 6 *N. H. R.* 25. *Van Vronker v. Eastman*, 7 *Met. R.* 157. *Walker v. Griswold*, 6 *Pick. R.* 416. *Maccubbin v. Cromwell*, 2 *Harr. & Gill's R.* 243.)

The right of the wife to redeem the mortgaged premises from the incumbrance of the mortgage, and thus entitle herself to dower as against the mortgagee, is now universally recognized in the American States. In a very early case, Parker, Ch. J., in discussing this subject, says: "If it should be for the interest of the wife, as in some cases it may be, to redeem the estate, there can be no good reason why she should not enjoy an estate, which, but for an incumbrance which she has removed, would always be subject to her claim." (*Bolton v. Ballard*, 13 *Mass. R.* 227.) And this doctrine is most clearly recognized in a large number of cases decided by the Massachusetts courts. (*Vide Snow v. Stevens*, 15 *Mass. R.* 278. *Peabody v. Patten*, 2 *Pick. R.* 517, 519. *Gibson v. Cuhon*, 5 *ib.* 146. *Eatan v. Simons*, 14 *ib.* 98. *Messiter v. Wright*, 16 *ib.* 151, 153. *Lund v. Woods*, 11 *Met. R.* 566. *Draper v. Baker*, 12 *Cush. R.* 288. *McCabe v. Bellows*, 7 *Gray's R.* 148.) And perhaps the general doctrine is equally well settled in most of the other states. (*Vide Heth v. Cocke*, 1 *Rand. R.* 344, 348. *Van Dwyne v. Thayer*, 14 *Wend. R.* 233. *S. C.* 19 *ib.* 162. *Wheeler v. Morris*, 2 *Bosw. R.*

524. *Rossiter v. Cossit*, 15 *N. H. R.* 38, 43. *Hastings v. Stevens*, 9 *Foster's R.* 564. *Bullard v. Bowers*, 10 *ib.* 500. *Adams v. Hill*, *ib.* 202. *Furman v. Clark*, 3 *Stockton's Ch. R.* 135. *Nottingham v. Calvert*, 1 *Carter's [Ind.] R.* 527, 529. *Watson v. Clendenin*, 6 *Blackf. R.* 477. *Harrow v. Johnson*, 3 *Met. [Ky.] R.* 578. *Reed v. Morrison*, 12 *Serg. & Rawle's R.* 18, 21. *Matthewson v. Smith*, 1 *Angell's R.* 22. *Wilkins v. French*, 20 *Maine R.* 111. *Campbell v. Knights*, 24 *ib.* 332. *Gage v. Ward*, 25 *ib.* 101, 103. *Simonton v. Gray*, 34 *ib.* 50. *Moore v. Rollins*, 45 *ib.* 493. *Danforth v. Smith*, 23 *Vt. R.* 247. *Campbell v. Murphy*, 2 *Jones' [N. C.] Eq. R.* 357. *Daniel v. Leitch*, 13 *Gratt. R.* 195. *Manly v. Buchanan*, 1 *Md. Ch. Decis.* 202. *Stewart v. Beard*, 4 *ib.* 319. *Fry v. Merchant's Ins. Co.* 15 *Ala. R.* 810. *Wheatley v. Calhoun*, 12 *Leigh's R.* 264. *Stoppelbein v. Shulte*, 1 *Hill's [S. C.] Ch. R.* 200. *Heneagan v. Harller*, 10 *Rich. Eq. R.* 285. *Snyder v. Snyder*, 6 *Mich. R.* 470.) The doctrine of the American cases upon this subject has been carefully extracted by Mr. Scribner and inserted in his generally very accurate work on dower, and the authorities fully cited. (1 *Scrib. on Dower*, 460-466. *Vide also McArthur v. McArthur*, 16 *Ohio St. R.* 193.) A mortgage fraudulently obtained from a wife, does not affect her inchoate right of dower, upon the principle that fraud vitiates every transaction induced by it. (*Connover v. Porter*, 14 *Ohio St. R.* 450.) Where a husband and wife mortgaged both real and personal estate to secure a debt, it was held that after the death of the husband the widow might insist upon having the personalty first applied to pay the debt, in order to save her right of dower in the realty. (*Harrow v. Johnson*, 3 *Met. [Ky.] R.* 578.) In all cases where the land of the husband is held subject to a lien, the wife may go into equity to have the land sold, and get her dower in the surplus. (*Daniel v. Leitch*, 13 *Gratt. R.* 195.)

§ 396. It sometimes happens that the rights of both mortgagor and mortgagee meet and unite in the same person, and in these cases the rule is not uniform as to the effect upon the widow's right of dower where the mortgagee becomes himself the owner of the equity of redemption. In a case of this character lately decided by the New Jersey court of errors and appeals, the court remarked: "The mortgagee holding, as against the mortgagor, the legal title, subject only to the condition or equity of redemption, may unite that equitable interest to his legal title, either by foreclosure or by

the voluntary release or conveyance of the mortgagor. Such union of the legal and equitable estate extinguishes, or, as the phrase is, merges the equitable in the legal estate, and the latter becomes absolute. The estate which was before a fee simple is still the same, but it is relieved of the condition or equity with which it had been previously incumbered. If by foreclosure, the condition is gone for all purposes, and the estate is absolute in the mortgagee. If by conveyance, it is so at law, and if the widow has any right, it is only in equity to redeem *pro tanto*. In such case the mortgagor does not hold under the subsequent conveyance, but under the mortgage, and, the equity of redemption being extinguished, his title is paramount to the dower title of the wife. It is an entirely different case when, the mortgage having been discharged, the tenant can rely only on the title derived from the husband. He who claims under the husband by conveyance during coverture will hold subject to the wife's dower. * * * It is difficult to see how the prior or subsequent acquisition of the legal title under the mortgage can affect the doctrine of merger. * * * The present seems to be the plain case of the equity of redemption united by purchase to the prior legal title of the mortgagee, and thus extinguished at law." (*Thompson v. Boyd*, 2 *Zabriskie's R.* 543.) The reasoning in this case appears to be plausible, but the conclusion to which the court arrived, viz., that the wife was deprived absolutely of her right to dower, without having joined in the absolute conveyance, will not generally be accepted as correct. The most that could be required of the widow in such a case would be that she should pay the full amount of the mortgage; probably she should be required only to pay her due proportion of the mortgage debt, when her right of dower would attach; and this is according to the better authority. (*Vide Van Vranker v. Eastman*, 7 *Met. [Mass.] R.* 157. *Lund v. Woods*, 11 *ib.* 566. *Campbell v. Knights*, 24 *Maine R.* 332. *Wood v. Wallace*, 10 *Foster's R.* 384. *Snyder v. Snyder*, 6 *Mich. R.* 470. *Keith v. Trapier*, 1 *Bailey's Ch. R.* 63. *Russel v. Austin*, 1 *Paige's Ch. R.* 192. *Runyan v. Stewart*, 12 *Barb. R.* 537.) And it has been held in New York that when the tenant in possession enters by virtue of a purchase of the equity of redemption from the mortgagor for purchase-money, and then buys the mortgage, and takes an assignment to himself, this extinguishes the mortgage, and the widow of the mortgagor is entitled to her dower, and that in such

case her right relates back to the purchase of her husband. (*Coates v. Cheever*, 1 *Cow. R.* 460, 479.) But unless the grantee of the husband took his conveyance subject to the mortgage in such a case, probably the wife would be obliged to contribute her proportion of the mortgage debt before her right of dower would fully attach.

§ 397. As the husband must be seised of or entitled to the entire inheritance at some time during the marriage, the wife, at common law, is not entitled to dower of a reversion or remainder, and hence, if the estate of the husband be subject to an outstanding freehold estate which remains undetermined during the coverture, the right of dower does not attach. The freehold and the inheritance must be consolidated, and be in the husband *simul et semel*, "at once and together," during the marriage to render the wife dowable. (4 *Kent's Com.* 39.) This is the plain language of text writers, and yet there are authorities which render the true doctrine quite uncertain. It appears that the courts, in their leaning in favor of and with a view of sustaining the right of dower, have been satisfied with a kind of *sub modo* union of the two estates. And accordingly it has been decided that the union will be regarded as sufficient to create the title to dower, when an estate for years intervenes between the particular estate and the remainder. (*Bates v. Bates*, 1 *Ld. Raym. R.* 326.) But the doctrine is well settled, that the wife is not entitled to dower in a vested remainder in fee belonging to her husband, limited on a precedent estate for life, because the husband must have been seised in fact or in law, in fee simple, at some time during the coverture, to entitle the wife to dower; the seisin must be an actual corporeal seisin, or a right to such seisin, and there can be no seisin in deed or in law, of a vested remainder limited on a precedent freehold estate.

The question whether the interposition of a *contingent* estate or freehold between a limitation to the husband for life and a subsequent remainder to his heirs will prevent dower, is elaborately discussed by Mr. Park, Mr. Scribner and others who have treated specially upon the subject of dower; but it would be of little use to enter into this abstruse learning here, as it has been well said that "such recondite points rarely occur." (4 *Kent's Com.* 40, note b.) Lord Hale states the general doctrine thus: "If the contingent remainder cannot take effect immediately on the first determination of the particular estate, whether it be determined

by merger or surrender, or in any other way whatsoever, it will never vest afterward, though the particular estate should come *in esse* again. * * * When an estate *in esse* and a contingent remainder over to him who had the first estate *in esse* are united together by *one and the same* conveyance, then the remainder *in esse* is vested until the contingent remainder comes *in esse*, and then the estate shall be opened and disjoined by the letting in of the contingent remainder, because they were all created together by the same conveyance, and therefore the estates shall be opened and closed as appointed by the original conveyance; but otherwise it is when the remainder *in esse* comes to the particular estate by any *grant or conveyance* made *after* the original conveyance, for then the contingent remainder will be destroyed." (*Purefoy v. Rogers*, 2 *Saund. R.* 380, 387.)

"Whenever a greater estate and a less coincide and meet in the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*; that is, sunk or drowned in the greater." (2 *Black. Com.* 177.) In such case, the intervening contingent interest would seem to interpose no obstacle to the attachment of dower. Mr. Scribner gives it as the result of the adjudged cases, and the concurring opinion of many of the writers on the law of real property, "that when a contingent estate of freehold is interposed between a limitation to the husband for life, and a subsequent remainder to his heirs, the remainder is executed in possession in the tenant for life *sub modo*; or, in other words, that the estates are consolidated or united *until* the happening of the contingency; but with the qualification annexed to such consolidation, that if the contingency happen, they shall again divide, and resume the character of several or distinct estates, so as to let in the estate limited upon that contingency. And it appears to be the prevailing opinion that upon this union of the freehold and inheritance *sub modo*, a right of dower attaches, subject to a liability to be divested upon the happening of the contingency, and the consequent vesting of the contingent estate." (1 *Scrib. on Dow.* 227, 228.) But except in cases of express statute, the authorities are quite uniform, that a wife is not entitled to dower in a vested remainder in fee limited on a precedent estate for life, nor in an estate in reversion expectant upon an estate of freehold: (*Vide Green v. Putnam*, 1 *Barb. R.* 500. *Beardslee v. Beardslee*, 5 *ib.* 324, 332. *Durando v. Durando*, 32 *ib.* 529. *Dunham v.*

Osborn, 1 *Paige's Ch. R.* 634. *Bates' case*, 1 *Salk. R.* 354. *Eldredge v. Forrestal*, 7 *Mass. R.* 253. *Fisk v. Eastman*, 5 *N. H. R.* 240. *Moore v. Esty*, *Ib.* 469. *Northcutt v. Whipp*, 12 *B. Mon. R.* 65. *Weir v. Humphries*, 4 *Ired. Eq. R.* 273.)

§ 398. If a man demise his estate to a person for life, reserving to himself and heirs a rent, and then marry, and die before the lessee, his widow will not be entitled to dower, either of the reversion or of the rent; not of the reversion, because the husband had no legal seisin of the freehold during the marriage; nor of the rent, because it partook of the nature of the estate out of which it was reserved, and the husband had only a freehold interest in the rent, although it might descend to his heirs. (*Darcy v. Blake*, 2 *Sch. & Leff. R.* 387.) But if a lease for years be made before the lessor marries, his wife will be endowed of both the reversion and the rent as incident to it; provided always that the term expired during coverture; and it has been held that a widow is entitled to dower in rents of lands leased by her husband, notwithstanding she executed a release to the lessee of her dower right; that such release only has the effect of a confirmation of the tenant's estate, and is not an abandonment of her dower as between herself and her husband's heirs. (*Williams v. Cox*, 3 *Edw. Ch. R.* 178. *Banks v. Sutton*, 2 *P. Wms. R.* 716. *Shrewsbury v. Shrewsbury*, 2 *Bro. C. C.* 120. *Tracy v. Hereford*, *Ib. note.* *Wheatley v. Best*, *Cro. Eliz.* 564.) She cannot, however, claim dower in rents which accrued after the death of her husband. Her remedy in such a case is against the heirs for detention of her dower. (*Williamson v. Ash*, 7 *Ind. R.* 495.)

The widow is not entitled to dower of an estate held by the husband in joint tenancy, if he die before the other joint tenant, because the claim of the surviving joint tenant is paramount to the widow's title, by survivorship under the original conveyance. The seisin of the husband must in all cases be sole by the rules of the common law. Littleton states the rule: "And it is to be understood that the wife shall not be endowed of lands or tenements which her husband holdeth jointly with another at the time of his death." (*Co. Litt.* 30.) This rule is imperative and universal except in those states where the *jus accrescendi* has been abolished. A severance of the jointure by an act of the husband which at the same time passes the fee of his moiety will not entitle his widow to dower. (*Co. Litt.* 31 b.)

But the law has been greatly modified in the United States with respect to estates held in joint tenancy, and in several of the states the *jus accrescendi* has been expressly abolished. Thus, the right of survivorship is substantially taken away in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Delaware, Maryland, Michigan, Ohio, Wisconsin, Illinois, Minnesota, Iowa, Missouri, Mississippi, Tennessee, Kentucky, Arkansas, Texas, California, Alabama, Georgia, Florida, North Carolina and Virginia, although there is occasionally an exception in cases of executors, administrators and the like, none of which affect the question of dower, and it is well understood that when the *jus accrescendi* is abolished, the impediment to dower created by the common law of survivorship is effectually removed. (*Vide Holbrook v. Finney*, 4 Mass. R. 566. *Davis v. Logan*, 9 Dana's R. 185. *Weir v. Tate*, 4 Ired. Eq. R. 264. *Reed v. Kennedy*, 2 Strobb. R. 67. *Segrant v. Steinberger*, 2 Ohio R. 305. *Miles v. Fisher*, 10 ib. 1. *Tabbe v. Wiseman*, 2 Ohio St. R. 207. *Phelps v. Jepson*, 1 Root's R. 48.) But the widows of tenants in common or coparceners may claim dower, since tenants in common and coparceners have several inheritances which descend to their respective heirs; so that a title to dower necessarily arises out of the seisions of their husbands. (*Litt.* § 45. *Sutton v. Rolf*, 3 Levinz. R. 84. *Potter v. Wheeler*, 13 Mass. R. 504. *Mosher v. Mosher*, 32 Maine R. 412. *Wilkinson v. Parish*, 3 Paige's Ch. R. 653. *Totten v. Stuyvesant*, 3 Edw. Ch. R. 500. *Dolf v. Bassett*, 15 Johns. R. 21. *Jackson v. Edwards*, 22 Wend. R. 498. *Davis v. Logan*, *supra*.)

§ 399. At common law a widow is not entitled to dower of a trust estate, for the reason that so far as dower is a legal remedy, and is to be pursued by legal remedies, it is obvious that the estates in respect of which it is claimed, can be such only as have existence in the contemplation of a court of law. And it is now well settled that the wife of a trustee is not dowable in equity of the trust estate, and a widow was never allowed dower of a use. (*Vide Powell v. Monson*, 3 Mason's R. 347, 364, 365. *Germond v. Jones*, 2 Hill's R. 569. *Cooper v. Whitney*, 3 ib. 101. *Cowman v. Hall*, 3 Gill & Johns. R. 398. *Noel v. Jevon*, 2 Freeman. R. 43. *Bevan v. Pope*, Ib. 71. *Stevens v. Smith*, 4 J. J. Marsh. R. 64. *Small v. Proctor*, 15 Mass. R. 495. *Stanwood v. Dunning*, 2 Shep. R. 290. *Gomez v. Tradesmen's Bank*, 4 Sand.

R. 102. *Herron v. Williamson*, 6 *Litt. R.* 250. *Lawson v. Morton*, 6 *Dana's R.* 471. *Bartlett v. Gouge*, 5 *B. Mon. R.* 152. *Edmondson v. Welsh*, 27 *Ala. R.* 578. *Derush v. Brown*, 8 *Ohio R.* 412. *Firestone v. Firestone*, 2 *Ohio St. R.* 415. *McNish v. Pope*, 8 *Rich. Eq. R.* 112. *Crittenden v. Johnson*, 6 *Eng. [Ark.] R.* 94. *Lenox v. Notrebe*, 1 *Hemp. R.* 251. *James v. Rowan*, 6 *Smedes & Marsh. R.* 393.)

But when the husband becomes entitled both to the equitable estate and legal fees, the equitable estate will merge in the legal estate, and the widow will be entitled to dower. (*Tulley v. Alston*, 3 *Ves. R.* 339. *Hopkinson v. Dumas*, 42 *N. H. R.* 296. *And vide Robison v. Codman*, 1 *Sumn. R.* 121. *Dean v. Mitchell*, 4 *J. J. Marsh. R.* 451. *Coster v. Clarke*, 3 *Edw. Ch. R.* 428.) However, the union of the legal and equitable estates must be perfect, or the widow will not be entitled to her dower. (*Knight v. Knight*, 4 *Beav. R.* 10. *Lyster v. Mahoney*, 4 *Drury & Warren's R.* 286.)

In the State of Pennsylvania, the widow is entitled to dower in trust estates, and it is possible a similar rule prevails in one or two others of the American States. (*Shoemaker v. Walker*, 2 *Serg. & Rawle's R.* 556.)

In many of the states, where the equity of the husband is perfect and complete, and his interest is of such a character that if it were a legal estate it would be subject to dower at common law, the right of the widow to be endowed thereof is recognized; and in some of the states dower is allowed unqualifiedly in equitable estates. Where the equity of the husband is perfect and complete, the widow has her dower in Virginia, Kentucky, New Jersey, Pennsylvania, Alabama and Mississippi, and in the District of Columbia; and in New York, Maryland, North Carolina, Ohio, Illinois, Iowa, Rhode Island, Tennessee, Missouri and Kansas, dower is allowed in all equitable estates. (1 *Scribner on Dower*, 384, 385, and authorities there cited.)

It is understood that when the widow is entitled to dower in equities, her right is restricted to such equitable estates as the husband held at the time of his decease; and this is especially the rule with respect to equitable interests acquired under executory contracts. (1 *Scribner on Dower*, 389. 1 *Washb. Real Prop.* § 14.) The principle "extends only to those cases in which the equitable interest of the husband in the trust property continues down to the

time of his death, so as to be inheritable by his heirs. And if he aliens it in his life-time, the widow will not be entitled to dower therein as against the grantee." (*Hawley v. James*, 5 *Paige's Ch. R.* 318, 453.) And this is the doctrine of the authorities. (*Pritts v. Ritchey*, 29 *Penn. R.* 71. *Purdy v. Purdy*, 3 *Md. Ch. Decis.* 547. *Rands v. Kendall*, 15 *Ohio R.* 671. *Wooley v. Magie*, 26 *Ill. R.* 526. *Barnes v. Gay*, 7 *Clarke's [Iowa] R.* 26. *Lobdell v. Hayes*, 4 *Allen's R.* 187, 191. *Heed v. Ford*, 16 *B. Mon. R.* 114. *Edmondson v. Montague*, 14 *Ala. R.* 370.)

§ 400. A widow is dowerable in lands devised to her husband in fee, although the estate is defeasible on his death without surviving issue. (*Kenedy v. Kenedy*, 5 *Dutch. R.* 185.) But if the husband execute a warranty deed for lands in which he has no title, and afterward obtains a patent for the same lands from the United States, and dies, his widow is not entitled to dower in such lands. The rule would probably be different if the conveyance by him had been by quitclaim instead of a warranty deed. (*Wooley v. Magie*, 26 *Ill. R.* 526.)

When buildings are burned on lands in which a widow has a dower right, and the same are insured, she is entitled to her portion of the insurance money. (*Campbell v. Murphy*, 2 *Jones' Eq. R.* 357.)

Wheat growing upon land set off to a widow as her dower, belongs to her, and not to the heirs of her husband. (*Ralston v. Ralston*, 3 *Iowa R.* 533.) But grass and fruits growing at the intestate's death go with the land, and the widow is not entitled to any part of them as dower. If, however, the land is assigned to her, she takes the whole. (*Kain v. Fisher*, 6 *N. Y. R.* 597.)

The widow is entitled to dower in land sold upon execution during the year for redeeming. (*Russell v. Austin*, 1 *Paige's Ch. R.* 192.)

A widow is not entitled to dower in a land contract held by her husband at the time of his death, in which he had paid only a part of the purchase-money. (*Pritts v. Ritchey*, 29 *Penn. R.* 71. *Vide also Owen v. Robbins*, 19 *Ill. R.* 545.) But she is entitled to dower in lands paid for and covenanted to be conveyed to her husband. (*Thompson v. Thompson*, 1 *Jones' [N. C.] R.* 430. *Reed v. Whitney*, 7 *Gray's R.* 533.)

In Kentucky it is held that stock in a railroad company is real estate, and subject to the widow's right of dower. (*Price v. Price*, 6 *Dana's R.* 107.) But in the State of Florida it was held that

the wife is not entitled to dower in shares of stock in a land company, which the husband had disposed of during his life. (*McDonough v. Hepburn*, 5 *Florida R.* 568.)

Dower cannot be recovered upon dower, but this rule applies only where dower has been actually assigned, and an outstanding right of dower in one cannot affect the right of a widow subsequently entitled to dower. A release by the former widow to the owner of the fee, before assignment, operates as an extinguishment of her rights. (*Elwood v. Klock*, 13 *Barb. R.* 50.) And to an action of dower, a prior right of dower which has been released to the tenant without being enforced, is no defense. (*Leavitt v. Lamprey*, 13 *Pick. R.* 382. And *vide Atwood v. Atwood*, 22 *ib.* 283.)

In equity, lands agreed to be turned into money, and money into lands, are considered as that species of property into which they were agreed to be converted; and the right of dower is regulated in equity by the nature of the property in the equity view of it. (4 *Kent's Com.* 50. *Greene v. Greene*, 1 *Ham. [O.] R.* 538. *Coster v. Clarke*, 3 *Edw. Ch. R.* 47.) This is upon the principle of equitable conversion, which is well understood by equity lawyers, and is defined to be "that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real, and transmissible and descendible as such." (*Francis' Maxims*, *Max.* 13.)

§ 401. The general rule is that the right of dower does not attach to lands appropriated to public uses. This was held at the period when castles were built and held for the protection and defense of the kingdom of Great Britain, the law in this respect preferring the public good to private individual claims. Upon the same principle the courts, at a later day, have held that the inchoate right of dower is extinguished in lands legally appropriated to the uses of the public. Thus, it has been held that the widow is not entitled to dower in lands dedicated to the public, by the husband, for a market-house. The court, in deciding the case, observes: "The whole space became subject to the same regulations as the grounds originally laid out in streets, and for other public uses and purposes. The claim of dower must stand upon the same principle that it would stand in any case to the ground thus appropriated. The counsel for the complainants insist that it is a case to be distinguished from that of public grounds condemned for public

uses, but the court are unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record the streets become public highways, and the title to the grounds set apart for public uses is vested in the county for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right while the use remains, consequently all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this state, but, so far as we are informed, in other states also. A claim of dower in the streets of a town, or in the public jail, court-house or public offices, would be a novel one, and if sustained could not be enjoyed without defeating the original purpose and present use of the grant. It cannot be admitted, for the same reason that it is not admitted to a castle in England. It could yield nothing to the support of the widow, by a direct participation in the possession, without such an interference with the public right to control the whole subject as to render its enjoyment inconvenient and unsafe, if not impossible." (*Gwynne v. Cincinnati*, 3 *Ohio R.* 24.)

The same rule is held where the land is appropriated by an act of the legislature. Thus, where land was taken by the authorities of the city of New York under an act of the state legislature, for the purposes of a public market, the court held that the land was discharged of any claim of dower, saying: "The question which is now presented is, whether a wife has such an interest in the premises owned by her husband, while her right of dower is inchoate, as cannot be divested by this act of the legislature and the proceedings under it. * * The power of the state to take private property for public uses, results from its right of eminent domain, and that power is not restricted except by the constitutional provision that just compensation shall be made to the owner of the entire estate in the land, and the inchoate right of the wife was not considered by the commissioners, and we think justly so, as an interest distinct from that of her husband, as the subject of estimate as to its value, separate from his. Indeed, the value of her interest, such as it was, would seem to be scarcely capable of being estimated as a separate interest. We see no reason to doubt that the commissioners were right in considering the entire estate in these lands as vested in the husband, and that he having been paid the full value of them, the corporation, by force of the act, became seised of the lands in fee simple absolute, discharged of any claim

of dower of the wife therein." (*Moore v. The City of New York*, 4 *Sandf. R.* 456, 460. *S. C. 8 N. Y. R.* 110.) Other authorities might be referred to upon the same subject, but it is unnecessary. The rule excludes dower in all cases where lands are legally appropriated for the purposes of streets and public highways, railroads, jails, court-houses, burial-grounds, market places, and the like; and in some cases burial-grounds are exempted from dower by statute. (1 *Scribner on Dower*, 555. *Weaver v. Gregg*, 6 *Ohio St. R.* 547. *Little Miami R. R. Co. v. Jones*, 5 *Weekly Law Gaz. [N. S.]* 5. *Melizet's appeal*, 17 *Penn. R.* 449. *Kennerly v. Missouri Ins. Co.* 11 *Missouri R.* 204. *Strong v. Clem*, 12 *Ind. R.* 37. *Giles v. Gullim*, 13 *ib.* 487. *Noel v. Ewing*, 9 *ib.* 37.)

In a word, the widow is entitled to dower in all lands and tenements in which her husband was seised during coverture, unless she is lawfully barred, and in some instances she is dowable in the equities and trusts of which her husband was possessed at the time of his decease, except that in some states the widow's dower is limited to the lands and tenements, both legal and equitable, of which her husband *died* seised.

CHAPTER XXVIII.

HOW DOWER IS BARRED OR PREVENTED — EARLY DEVICES TO EFFECT IT — WIFE'S RELEASE — CONVEYANCE BY HUSBAND BEFORE MARRIAGE — THE WIFE'S JOINTURE — DEVISE IN LIEU OF DOWER — SALE ON EXECUTION AND FOR TAXES — DIVORCE — ADULTERY OF THE WIFE — ARTICLES OF SEPARATION — ESTOPPEL OF THE WIFE.

§ 402. MANY are the devices which have been invented for the purpose of barring or preventing dower, but most of them have failed to answer the end proposed, without being attended in other respects with hazard and inconvenience. The first limitation contrived was "to the purchaser and his trustee, and their heirs, in trust for the purchaser and his heirs;" the effect of which was to vest a legal joint tenancy in fee in the husband and his trustee, with the beneficial interest of the trustee's share in the purchaser, and the widow of a joint tenant is not entitled to dower. But if the husband survived his trustee, he became at once solely seised

of the inheritance, and the right of dower immediately attached to that seisin. This method to exclude dower, therefore, failed.

An improvement was then attempted by grafting upon the limitation, "to the purchaser and his trustee, and the heirs of the trustee, in trust for the purchaser;" or "to the trustee and his heirs, in trust for the purchaser and his heirs." But serious objections were soon discovered to this; for the trustee might die without an heir, and then the estate would escheat to the crown, or, if the trustee left an heir, that person might be a minor, a married woman or a lunatic, in which cases it might be difficult to procure the proper conveyance of the legal fee-simple. The objections, therefore, to the adoption of these limitations, were such as to induce a perseverance in the attempt to frame a more eligible limitation in these cases, until finally two forms were adopted which seemed to answer the end desired. One form of limitation was "to such uses as the purchaser shall by deed, etc., appoint, and in default of appointment to the use of himself for life, without impeachment of waste; and from and after the determination of that estate in his life-time, by forfeiture or otherwise, to the use of a trustee and his heirs, or his executors and administrators, during the purchaser's life, in trust for him for life, and from and after the determination of the estate so limited in use to the trustee and his heirs, or his executors and administrators, during the purchaser's life, to the use of the purchaser, his heirs and assigns forever."

The other form was, "to such uses as the purchaser shall by deed or will appoint; and for want of appointment to the use of a trustee, his heirs and assigns, or executors and administrators, during the life of the purchaser, in trust for him, and subject thereto, to the use of the purchaser, his heirs and assigns." These limitations, with some slight variations, were in general use in England until 1834, when, by the late dower act, a man was enabled to prevent his wife's dower from attaching by a declaration to that effect in the deed of purchase, or any deed executed by him. (3 and 4 William IV, ch. 105, § 6. *Vide also Park on Dower*, 83 *et seq.*)

§ 403. The usual way of barring dower in this country is for the wife to join with her husband in the deed of conveyance, although she must use apt and proper words of grant and release on her own part, and such as clearly manifest an intention to relinquish her dower, for the instrument is not the wife's deed if the husband by

the direction of the wife and in her presence, put her name to it without any manual act on her part, notwithstanding she subsequently acknowledge it in the usual manner; and therefore in such a case the deed will not bar the widow's dower. (*Vide Linsley v. Brown*, 13 *Conn. R.* 192. *Catlin v. Ware*, 9 *Mass. R.* 218. *Lufkin v. Curtis*, 13 *ib.* 223. *Stearns v. Swift*, 8 *Pick. R.* 532. *Leavitt v. Lamprey*, 13 *ib.* 382. *Melvin v. Locks*, 16 *ib.* 137. *Hall v. Savage*, 4 *Mason's R.* 273. *Powell v. Monson and Brimfield Manufacturing Company*, 3 *ib.* 347. *Stevens v. Owen*, 25 *Maine R.* 94. *Gordon v. Stevens*, 2 *Hill's Ch. R.* 48. *Westfall v. Lee*, 7 *Clarke's [Iowa] R.* 12. But *vide Frost v. Deering*, 21 *Maine R.* 156.) But if the wife was not of full age at the time of executing the deed, or if the deed does not contain apt words showing her intention to relinquish her dower, she will not be barred, though she has signed and sealed the deed and made the statute acknowledgment. (*Priest v. Cummings*, 16 *Wend. R.* 617. *Markham v. Merritt*, 7 *How. [Miss.] R.* 437. *Thomas v. Gornel*, 6 *Leigh's R.* 9.) And the deed of an adult married woman, executed by her alone, relinquishing her dower in land previously conveyed by her husband by his separate deed does not bar the widow of her dower. (*Page v. Page*, 6 *Cush. R.* 196. *Vide also Dodge v. Ayerigg*, 1 *Beasley's [N. J.] R.* 82.) Although a mortgage executed by the husband, his own name alone being used in the body of the instrument, but signed by his wife also, who relinquished her right of dower and made her acknowledgment in an after part of the instrument, and there being sufficient from an inspection of the whole instrument to believe that the intention of the parties was to consider the whole paper as forming one assurance, was held by the supreme court of the United States to bar the wife of her dower as far as the mortgaged premises were concerned. (*Dundas v. Hitchcock*, 12 *How. [U. S.] R.* 256.)

The deed must in many of the states be separately acknowledged by the wife, after a private examination apart from her husband, and such acknowledgment must be certified by a competent officer and in the mode pointed out by statute; and if the acknowledgment or certificate of the magistrate be not in strict compliance with the statute, the deed is void as to the wife, and her right of dower is not thereby barred or discharged. (*Vide Kirk v. Dean*, 2 *Binn. R.* 341. *McIntire v. Ward*, 5 *ib.* 296. *Shaller v. Brand*, 6 *ib.* 435. *Evans v. The Commonwealth*, 4 *Serg. & Rawle's R.* 272.

Jourdan v. Jourdan, 9 *ib.* 268. *Share v. Anderson*, 7 *ib.* 43. *Cassel v. Cook*, 8 *ib.* 268. *Barnet v. Barnet*, 15 *ib.* 72. *Steele v. Thompson*, 14 *ib.* 84. *Thompson v. Morrow*, 5 *ib.* 289. *Jamison v. Jamison*, 3 *Whart. R.* 457. *Scanlar v. Turner*, 1 *Bailey's R.* 421. *Watson v. Bailey*, *Ib.* 470. *Middock v. Williams*, 12 *Ohio R.* 377. *Connell v. Connell*, 6 *ib.* 353. *Jackson v. Stevens*, 16 *Johns. R.* 110. *Jackson v. Cairns*, 20 *ib.* 301. *Sheppard v. Wordell*, 1 *Cox's R.* 452. *Clark v. Redman*, 1 *Blackf. R.* 379. *Elliot v. Piersol*, 1 *McLean's R.* 11. *Rogers v. Moody*, 23 *Mo. R.* 548.)

But by ancient custom in some of the states, dower was barred if the wife simply joined with the husband without making any separate acknowledgment. (*Vide Constantine v. Van Winkle*, 6 *Hill's R.* 177. *Durant v. Ritchie*, 4 *Mason's R.* 45.) And in some of the states the wife might formerly bar her dower by a separate deed, executed after and in consideration of her husband's sale and conveyance. (*Fowler v. Shearer*, 7 *Mass. R.* 14. *Ela v. Cord*, 2 *N. H. R.* 176. *Shepherd v. Howard*, *Ib.* 507. *Rowe v. Hamilton*, 3 *Greenl. R.* 65. *Thompson v. Peebles*, 6 *Dana's R.* 391.) Of course, in these states, as in Connecticut, Vermont, North Carolina, Tennessee, Georgia, Mississippi, New Hampshire, and perhaps one or two others, where the right of dower is restricted to the lands of which the husband died seised, the husband's conveyance independent of his wife bars her dower. But in most of the states, as in Alabama, Arkansas, Delaware, Florida, Illinois, Iowa, Kentucky, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Oregon, Rhode Island, South Carolina, Virginia, Wisconsin, and in the District of Columbia, the concurrence of the wife is necessary to divest her of her right of dower in all legal estates; though in case of an *equitable* estate, the husband may transfer it alone at any time before his decease, and thus cut off the dower right of his wife. In Pennsylvania the common law rule applies the same as in the last above mentioned states, except that "the widow's right of dower, though much respected, is liable to be defeated by a judicial sale for the payment of debts; and on a mortgage after coverture not executed by the wife, by a sale or judicial process, her dower is defeated." (*Reed v. Morrison*, 12 *Serg. & Rawle's R.* 18, 21.) But the rule is limited to judicial sales, and does not extend to transfers made by the husband. "Dower would be altogether insecure if the husband might bar it by a voluntary

sale for payment of a debt, however small, even when incurred to serve for a pretext. For that reason it was ruled in *Eberle v. Fisher* (1 *Harris' R.* 526) that a husband's assignment in insolvency does not divest his wife's dower in the land, inasmuch as it was not, at the time, in the gripe of his creditors. In the present case the husband was free to do with it what he pleased, but always in subordination to the incipient estate of his wife. Had he sold it himself, and paid his debts with the price of it, her dower would have remained in it, and his sale can have no other effect when made by the instrumentality of trustees appointed and empowered by him." (*Helfrich v. Obermyer*, 15 *Penn. R.* 113.) And it was said in a recent case: "Our common law dower exists only in relation to land sold by the husband without his wife's consent; and dower in such case may generally be very unjust; for thus a widow may be endowed of land sold by her husband in his life-time, and yet share in other estate, real and personal, that may have been obtained by the sale of it." (*Pritts v. Ritchey*, 29 *Penn. R.* 71.)

§ 404. A release to the husband by the wife during coverture is no bar of the dower. (*Rowe v. Hamilton*, 3 *Greenl. R.* 63. *Ela v. Card*, 2 *N. H. R.* 176. *Crain v. Cavana*, 36 *Barb. R.* 410.) Nor is a release by the wife to a third person under whom the tenant does not claim, a bar to the widow's dower. (*Robinson v. Bates*, 3 *Met. R.* 40. *Shaw v. Ross*, 14 *Maine R.* 432.) And it has been held that a contract before coverture not to claim dower is no bar. (*Hastings v. Dickinson*, 7 *Mass. R.* 153. *Gibson v. Gibson*, 15 *ib.* 106. *Croadt v. Ingraham*, 13 *Pick. R.* 33. *Vance v. Vance*, 21 *Maine R.* 364.) An instrument purporting to release a widow's dower, signed by her, but not sealed, is not a release of her dower. (*Giles v. Moore*, 4 *Gray's R.* 600.) But a quitclaim deed from two grantors, signed and sealed by each of them, and signed by their wives, with one seal against both signatures, and concluding, after the clause of release of dower, "in witness whereof, we, the grantors, have hereunto set our hands and seals," is sufficient to bar the dower of the wives. (*Tasker v. Bartlett*, 5 *Cush. R.* 359.)

When the widow conveys to the administrator of her deceased husband all her "right, title and interest of dower," her dower in the lands, and share in the personal property of her husband pass. (*McFarland v. Baze*, 24 *Miss. R.* 156.)

The wife's release of dower in mortgaged premises will not bind the wife and defeat her dower if the mortgaged estate is subsequently redeemed by the husband's administrator. (*Hildreth v. Jones*, 13 *Mass. R.* 525.) But after the wife has duly released her claim to dower in the mortgaged premises, and the husband's equity of redemption is subsequently sold by his administrator, and the estate redeemed by the purchaser, it has been held in Massachusetts that the widow will not be entitled to dower. (*Popkin v. Burnstead*, 8 *Mass. R.* 491. *Gibson v. Crehore*, 3 *Pick. R.* 475.)

A release of dower will not be presumed from the fact that the premises on which dower is claimed were in the adverse possession to the husband for more than twenty years during his lifetime. (*Durham v. Angier*, 20 *Maine R.* 242.) Nor will a release of dower by the wife to one tenant in common, of her husband, operate as a release to the other. (*White v. White*, 1 *Harris. [N. J.] R.* 202.) And a parol release is void. (*Worthington v. Middleton*, 6 *Dana's R.* 300.)

A release of dower can operate only *as a release*; it must accompany the conveyance of another, and ceases to operate with that; it cannot operate as the transfer of an independent estate. Thus, when a husband, whose land is bound by the lien of a judgment, conveys the land with a release of dower, and the land is afterward sold under the judgment, the purchaser from the husband cannot claim as an assignee of the wife, or as deriving a distinct estate from her, against the execution purchaser. So, upon the sale of mortgaged lands, the vendee takes them clear of dower, if released; but if the mortgage is paid, never takes effect, or ceases to operate, the right of dower revives. (*Douglas v. McCoy*, 5 *Ohio R.* 527. *Pride v. Boyce*, 1 *Rice's Eq. R.* 275.)

The wife may bar her dower in a particular close, even before it is assigned, by executing a quitclaim deed after the husband's death, in which she covenants that she will claim no dower in the premises. (*Grant v. Perham*, 15 *Vt. R.* 649. *Thatcher v. Howland*, 2 *Met. R.* 41.) Under some circumstances, although the wife do join with her husband in the deed, she does not thereby lose her dower; as when, after the execution of the deed, the purchaser recovers damages of the husband for breach of the covenant of good right to convey, the release of dower then becomes void, because the recovery in such action debars the purchaser from

afterward claiming any thing by his deed; or, when, after the joint conveyance, an execution against the husband is levied on the land so conveyed, and the judgment creditor recovers it from the prior purchaser on the ground that the conveyance to him was fraudulent, here the right of dower revives, notwithstanding the wife's release was properly executed, and she may recover her dower from the creditor or his assigns. (*Stinson v. Sumner*, 9 *Mass. R.* 143. *And vide Robinson v. Bates*, 3 *Met. R.* 40. *And also Bing. on Cov.* 328, note 2, where most of the points taken in this section are suggested.) Neither will the wife be barred when she has released her claim to dower in premises mortgaged by her husband, and after his decease his administrator has discharged the mortgage, although before such discharge, the judge of probate, by reason of her release, had made an allowance out of the personal estate. (*Hildreth v. Jones*, 13 *Mass. R.* 525.)

§ 405. It seems that a renunciation of dower is not so much a conveyance as it is a bar to the wife's claim to attend the conveyance of the husband, to endure while that endures, and cease to operate when that expires. So, as has been before suggested, when mortgaged lands are sold under a mortgage whereupon dower has been released, the purchaser takes not only the fee but the dower also. But when the mortgage is satisfied by payment of the debt, the dower reverts to the wife *eo instanti*. So, if the mortgage ceases to operate, or never begins to operate, the dower remains with the wife, or returns to her, as the case may be, without the necessity of a reconveyance. (*Richard v. Talbaird*, 1 *Rice's Eq. R.* 158.)

It may be further affirmed that a renunciation of dower on a mortgage cannot operate beyond the estate conveyed, so as to have the effect of a perpetual bar; it can only postpone the claim of dower to the satisfaction of the lien, and the land stands as security for the debt secured by the mortgage, unincumbered by the wife's rights. The other creditors have no right to the aid of the wife's dower for the payment of their debts. Therefore, when the wife had renounced her dower on mortgage by her husband, and after his death on marshaling his assets in a court of equity, the mortgage debts were paid out of the personalty, it was held that the widow was entitled to her dower, and a sum of money assigned in lieu thereof was ordered to be paid to her out of the land which was ordered to be sold for the payment of debts. (*Keckley v. Keckley*, 2 *Hill's Ch. R.* 252.)

It has been also held in South Carolina that a covenant by a wife, prior to and in consideration of the marriage, not to claim or demand dower or any other right, title or interest, in the real estate of her husband, cannot operate as an estoppel against her at law; nor will it bar her dower under the statute, 27 Henry VIII, chapter 10, section 6, without a competent jointure; but if she were of full age at the time, such an agreement will be enforced in equity, and the wife be excluded both from dower and a distributive share of her husband's real estate where he has died intestate; although it seems she will still be entitled to her distributive share of the personal estate under the act of 1791. (*Gelzer v. Gelzer*, 1 *Bailey's Eq. R.* 387.) But a fair antenuptial agreement executed by the wife for a valuable consideration will unquestionably bar her of her dower. (*Stilley v. Folger*, 14 *Ohio R.* 610. *Phillips v. Phillips*, 14 *Ohio St. R.* 308. *Murphy v. Murphy*, 12 *ib.* 407. *Cawley v. Lawson*, 5 *Jones' Eq. R.* 132.) But where the antenuptial provision for the wife rests only on the undertaking by the husband to pay or restore money to her, equity will see the provision executed before it deprives her of her dower, at least where the claim to dower is resisted by volunteers. Whether the same strictness would be held in the case of purchasers, *quere*. (*Johnson v. Johnson*, 23 *Miss. R.* 561.)

An antenuptial agreement between husband and wife, by which she was to enjoy exclusively certain property to which she was entitled as the widow of her former husband, and which was not stated to be in lieu of dower, was held to be no bar to the wife's claim of dower in the lands of her second husband. (*Swaine v. Perine*, 5 *Johns. Ch. R.* 482, 489.)

§ 406. A deed given by a husband just before his marriage to his daughter, without any consideration, and kept secret until after the marriage, was held fraudulent and void as to the wife, and did not bar her of her dower in the lands conveyed. (*Swaine v. Perine*, *supra*.) But where a father, in contemplation of marriage, conveyed by way of advancement to his son, with intent to prevent his intended wife from taking dower, and she married him in ignorance of the conveyance, it was held, by the supreme court of the State of New York, that the widow was not entitled to dower. Bronson, J., delivering the opinion of the court, said: "What a court of equity might say about such a fraud as that, I will not undertake to determine; but, notwithstanding the case of *Swaine v.*

Perine (5 *Johns. Ch. R.* 482), I think the court would say that there was no fraud in the matter. But, however that may be, we have not been referred to any case, nor have I met with any, where a court of law has undertaken to set aside a deed upon this ground. The husband was not seised at any time during the coverture, and if the plaintiff can succeed anywhere, she cannot in a court of law." (*Baker v. Chase*, 6 *Hill's R.* 482, 483. *Vide Cranson v. Cranson*, 4 *Mich. R.* 230.) It has been held that the retention by the husband of the possession of the property after the transfer of the title, or keeping the deed in his hands after its execution, is one of the badges of fraud upon the right of his wife to prevent her receiving her dower, and a conveyance thus fraudulently executed will not bar the wife's dower. (*Hays v. Henry*, 1 *Md. Ch. Decis.* 337.) In the State of North Carolina, the court held, in accordance with the rule laid down in *Swaine v. Perine*, that a deed made by the husband before marriage, without consideration, and for the purpose of defeating the dower of his intended wife, did not bar her dower. (*Littleton v. Littleton*, 1 *Dev. & Batt. R.* 327.) And in Vermont, where, by statute, the wife's dower is restricted to the lands of which her husband *died* seised, it has been held that an absolute conveyance to children, without valuable consideration, and with intent to defeat the wife of dower, does not bar her of her rights. (*Thayer v. Thayer*, 14 *Vt. R.* 107.) But it seems that the mere absence of valuable consideration is not sufficient to avoid the deed; there must be a specific intent to defraud the wife of her dower, or the deed will defeat her right. (*McIntosh v. Ladd*, 1 *Humph. R.* 459.)

Whether the wife shall have dower in lands conveyed by her husband with the intent to defraud his creditors, she having joined in the deed, is not definitively settled, although the better opinion is, that, in such a case, where the creditors have set aside the conveyance, the wife will be entitled to her dower. (*Vide Robinson v. Bates*, 3 *Metc. R.* 40. *Kimball v. Eaton*, 8 *N. H. R.* 391. *Winship v. Lamberton*, referred to in *Woodworth v. Paige*, 5 *Ohio St. R.* 70. *Miller v. Wilson*, 15 *Ohio R.* 108, 117. *Summers v. Babb*, 13 *Ill. R.* 483. *Stribling v. Ross*, 16 *ib.* 122. But *vide also Manhattan Company v. Evertson*, 6 *Paige's Ch. R.* 457. *Wiswall v. Hall*, 3 *ib.* 313, and *Den v. Johnson*, 3 *Har. R.* 87.)

In Massachusetts, it has been held, in so many words, that a conveyance by the husband before marriage, although in fraud of his

creditors, bars the wife's dower. (*Whithed v. Mallory*, 4 *Cush. R.* 138.) And dower is in all cases extinguished by the conveyance of the lands by the husband before dower attaches. (*Rawlings v. Adams*, 7 *Md. R.* 26. *Firestone v. Firestone*, 2 *Ohio St. R.* 415. *Bowie v. Berry*, 3 *Md. Ch. Decis.* 359.)

Dower, in North Carolina, is barred by the voidable deed of the husband, but which is never avoided by him; otherwise, if the deed is void, as if given for an usurious consideration. (*Norwood v. Marrow*, 4 *Dev. & Batt. R.* 442.) But a widow, in Virginia, will not be barred by attempting to claim under a deed of the husband, which was avoided by his creditors as fraudulent, it being made to the use of the husband and his children, and consequently to the use of his wife, she not having signed the deed. (*Blow v. Maynard*, 2 *Leigh's R.* 30.)

The mere fact that the husband failed to acknowledge and put on record his deed, *bona fide* made before marriage, does not give the wife a right of dower in the premises so conveyed. (*Blood v. Blood*, 23 *Pick. R.* 80. *Vide also Emerson v. Harris*, 6 *Metc. R.* 475.)

The lien of a vendor upon land sold to the husband for the purchase-money is paramount to the claim of the vendee's widow, and will bar the dower unless discharged. (*Ellicott v. Walch*, 2 *Bland's R.* 244.) And when the husband purchases land, and gives back a mortgage to secure the purchase-money, the mortgage overrides the wife's dower. (*Boynton v. Sawyer*, 35 *Alabama R.* 497.) It has been held, however, in the State of Illinois, that the mechanics' lien has to give way to dower. (*Gove v. Cather*, 23 *Illinois R.* 634.)

§ 407. A good and valid jointure, so called, made before coverture, to the woman herself, and not to others in trust for her; to be in satisfaction of her whole dower; the estate to take effect immediately from the death of the husband, and being for the term of the wife's life, or greater estate, is a bar to the wife's right of dower; and a jointure possessing all these requisites, will be a bar of dower, although the wife was an infant at the time of the settlement. (*Drury v. Drury*, 5 *Bro. P. C.* 370. *Carruthers v. Carruthers*, 4 *Bro. Ch. R.* 500. *Smith v. Smith*, 5 *Ves. R.* 189. *Corbet v. Corbet*, 1 *Sim. & Stu. R.* 612. *Levering v. Levering*, 2 *Md. Ch. Decis.* 81. *McCarter v. Teller*, 2 *Paige's Ch. R.* 511. *Shaw v. Boyd*, 5 *Serg. & Rawle's R.* 311.) But such a jointure, in case

of an infant wife, to be an equitable bar, must be as certain and as beneficial to the infant as a legal jointure must be to be a legal bar. It must be a provision to take effect immediately on the death of the husband, and to continue during the life of the widow, and be a reasonable and competent livelihood for her under all the circumstances. A conditional jointure is not binding unless accepted by the wife after the husband's death. A lease, or determinable freehold, which might not continue for her life, was not considered an equivalent for dower. A condition that the wife should live chaste during marriage is not objectionable; but a condition that she should not run her husband in debt is doubtful. An annuity limited to widowhood may not be considered unreasonable in ordinary marriages; but when the man was seventy-five years old, and the woman an infant, the restraint upon matrimony was deemed unreasonable, and the jointure was held no bar. (*McCarter v. Teller*, 2 *Paige's Ch. R.* 511. And *S. C.* 8 *Wend. R.* 267.)

A grant of a rent charge, out of particular lands, to an infant for her jointure, although the grantor be afterward evicted, yet the contract being in equity a general agreement to grant a rent charge to that amount out of *some* lands, will bind the infant, it seems, if her parent or guardian assent to it. (*Corbet v. Corbet*, 1 *Sim. & Stu. R.* 612. *S. C.* 5 *Russ. R.* 254.)

If the jointure be made to the wife during coverture in satisfaction of dower, she may waive it after her husband's death, but if she enter and agree thereto, she is concluded; for though a woman is not bound by any act when she is not at her own disposal, yet if she agree after she is at liberty, it is her own act, and she cannot avoid it. (*Frank v. Frank*, 3 *Myl. & Cr. R.* 171. *Vance v. Vance*, 21 *Maine R.* 364.)

It is said by the learned editors of Reeve's Domestic Relations, in a note at page 113 of the last edition of that work, that this is one of the provisions of the statute of 27 Henry VIII, and it has probably been adopted in all the states where the law of jointure in bar of dower has been introduced. In Vermont, by the Revised Statutes of 1839, the widow may make her election within eight months after the will of the husband shall have been proved, or after letters of administration shall have been granted on his estate, to receive the jointure or pecuniary provision in lieu of dower, or to waive it, and have her dower set out; and this, whether the jointure or provision was settled before or after mar-

riage. By the Revised Statutes of 1863, it is declared that the widow may be barred of her dower in all the lands of her husband, in the following ways: First, where a jointure shall have been settled on such widow by her husband or other person, or some pecuniary provision shall have been made for her before her marriage, with or without her consent, to have effect after the death of her husband, and expressed to be in lieu and discharge of her dower; second, where her husband, by his last will and testament, shall have made provision for such widow, which it shall appear to the probate court was intended to be in lieu of dower; and, third, where the husband shall die, leaving no children or representatives of children, and the widow shall thereby be entitled to one-half of the estate of her husband. (*R. S.* 1863, *ch.* 55, § 5.) This is the law now in force in the state, and it will be observed that the provisions are absolute, and give the widow no power of election. And the statute further provides that a devise bars all claim to curtesy or dower. (*R. S.* *ch.* 55, § 15.)

In Massachusetts, the statute of 27 Henry VIII has always been in force upon this point. (*Hastings v. Dickinson*, 7 *Mass. R.* 173.) And the same provision is now incorporated into the Massachusetts General Statutes. (*Gen. Stat.* 1860, *ch.* 90, §§ 9-11.)

In the State of New York, the assent of the wife to the jointure must be evidenced, if she be of full age, by her becoming a party to the conveyance by which it shall be settled; if she be an infant, by her joining with her father or guardian in such conveyance. Any pecuniary provision made for the benefit of an intended wife and in lieu of dower, if assented to by her in the manner provided, is made a bar to any right or claim of dower of such wife in all the lands of her husband. If, before her coverture but without her assent, or if, after her coverture, lands are given or assured for the jointure of a wife, or a pecuniary provision be made for her in lieu of dower, she must make her election whether she will take such jointure or pecuniary provision, or whether she will be endowed of the lands of her husband. And if laws be devised, or a pecuniary or other provision be made for the wife by will, she must make her election in the same manner; and in each case the settlement will be binding on the wife unless she dissents, and enters or sues for dower within one year after the death of her husband. (1 *R. S. part 2, ch.* 1, *tit.* 3. §§ 9-14. 1 *Stat. at Large*, 692, 693.)

In Connecticut the law is substantially the same, though in that state a jointure may as well consist of personal as real property. (1 *Swift's Dig.* 86. *R. S.* 1866, *tit.* 20, *ch.* 4, § 86.)

A legacy to the wife of the testator is regarded in lieu of dower where it appears from the will that such is the manifest intention of the testator; and the rule applies as well to a devise of real estate as a bequest of personal estate. (*Lord v. Lord*, 23 *Conn. R.* 327. *Hickey v. Hickey*, 26 *ib.* 261.)

In the State of Pennsylvania the widow is entitled to her choice either of her dower or of the estate or property devised or bequeathed in lieu of dower. (*Laws of 1833*, p. 249.) In this state the widow's interest in the real estate of her deceased husband does not come within the ordinary definition of dower, because that refers to the common law provision for widows; but it is a statutory substitute for that provision, and may very well be called her statutory dower. Like dower at common law, it is a defined interest in her late husband's lands, arising at his death, and is a freehold estate. (*Bachman v. Chrisman*, 23 *Penn. R.* 163. *Vide Cord's Rights of Married Women*, 671, note 2.) It may be considered doubtful whether a settlement of personal estate would be held a jointure sufficient to bar dower, but the doctrine of the case of *Drury v. Drury*, that an infant's dower may be barred by jointure, is considered as settled law. (*Shaw v. Boyd*, 5 *Serg. & Rawle's R.* 309. *Vide also on the subject of jointure in Pennsylvania*, *Hinnershitz v. Bernhard's executors*, 13 *Penn. R.* 521, 522. *Boreland v. Nichols*, 2 *Jones' R.* 38. *Melizet's appeal*, 17 *Penn. R.* 453, 454. *Taylor v. Birmingham*, 29 *ib.* 306. *Anderson's appeal*, 36 *ib.* 476.)

In Virginia, if the widow is evicted of her jointure, she may still enforce her right of dower. (*Ambler v. Weston*, 4 *Hen. & Munf. R.* 23.)

In the State of Illinois, a jointure for an intended wife, with her assent, to be taken in lieu of dower, is a bar to any right or claim of dower of the wife in any land of her husband; but such assent must be evidenced, if she be of full age, by her becoming a party to the conveyance by which the jointure is settled; if an infant, by her joining with her father or guardian in the conveyance. If the jointure be made before marriage, but without her assent, or after marriage, she must make her election whether she will take the jointure or be endowed of the lands of her husband, but she cannot have both; and she will be deemed to have elected

to take the jointure, unless she file a written renunciation thereof in the office of the court of probate within one year after the authentication or probate of the will. (*Law of 1845. 1 Purple's Dig.* 494, *ch. 2, title Dower*, §§ 7-11. *Vide also Sisk v. Smith*, 1 *Gilman's R.* 509, 510.) Similar provisions in regard to jointures barring dower are found in the statutes of some others of the states.

It has been held, in Kentucky, that a jointure not intended to satisfy dower is no bar. (*Yancy v. Smith*, 2 *Met. [Ky.] R.* 408.) And the same doctrine has been held in the State of Illinois. (*Hoots v. Graham*, 23 *Ill. R.* 81.) The provision must also be positive, and not optional or conditional, and must be performed, or it will be no bar. (*Vincent v. Spooner*, 2 *Cush. R.* 467. *Hone v. Van Schaick*, 7 *Paige's Ch. R.* 221. *Blackman v. Blackman*, 16 *Ala. R.* 633.)

An antenuptial bond is no lien on the real estate of the husband, but is taken, like any security, with all its defects. (*Dyke v. Rendall*, 13 *Eng. L. & Eq. R.* 404.)

The term "jointure," as used in the Kentucky statutes, denotes any species of estate in real or personal property created by conveyance or devise, and intended to be in lieu or satisfaction of dower. (*Tevis v. McCreary*, 3 *Met. R.* 151.) But the agreement of a third person to indemnify the husband against alimony and dower does not bar the wife's dower. (*Gaines v. Poor*, 3 *Met. R.* 503.)

§ 408. It is a very common practice for husbands to give property or money to their wives, by will, in lieu of dower, and it is a well established principle that the acceptance of such a provision by a widow is a bar at law as well as in equity to her right of dower in any lands of the husband other than those devised to her. (*Wake v. Wake*, 1 *Ves. R.* 335. *Edwards v. Morgan*, 13 *Price's Ex. R.* 782. *Kennedy v. Mills*, 13 *Wend. R.* 553. *Jackson v. Churchill*, 7 *Cow. R.* 287. *Van Orden v. Van Orden*, 10 *Johns. R.* 30. *Hoyle v. Stewart*, 8 *ib.* 104. *Kennedy v. Nedrow*, 2 *Dall. R.* 418. *Kennedy v. Wistar*, cited 1 *ib.* 418. *Evans v. Webb*, 1 *Yeates' R.* 424. *Duncan v. Duncan*, 2 *ib.* 302. *Hamilton v. Buckwalter*, *ib.* 389. *McCullough v. Allen*, 3 *ib.* 10. *Wilson v. Hamilton*, 9 *Serg. & Rawle's R.* 424. *Simarweaver v. Stoeve*, 1 *Watts & Serg. R.* 160. *Shotwell v. Sedam*, 3 *Ohio R.* 5. *Chapin v. Hill*, 1 *R. I. R.* 446.) But it is held that it must expressly appear by the will, or the implication ought strongly to appear by

the instrument, that it was the husband's intention that the wife should not have both the testamentary provision and her dower. (*Kennedy v. Nedrow*, 2 *Dall. R.* 418. *Hamilton v. Buckwalter*, 2 *Yeates' R.* 389. *McCullough v. Allen*, 3 *ib.* 10. *Jackson v. Churchill*, 7 *Cow. R.* 287.)

In some of the states it is provided by statute, however, that every devise to the wife of the testator, unless otherwise expressed, is to be construed in lieu of dower. Such is the law in Mississippi, Missouri, Ohio, Massachusetts, Tennessee, North Carolina, Alabama, New Jersey, Pennsylvania, and Minnesota, although the widow may dissent from the devise within a limited time, and she can in no instance enjoy both unless it clearly appears to be the intention of the testator. (*Vide Thompson v. Egbert*, 2 *Harr. [N. J.] R.* 460. *Crane v. Crane*, 17 *Pick. R.* 422. *Allen v. Pray*, 3 *Fairf. R.* 138. *Stilley v. Folger*, 14 *Ohio R.* 610. *Hilliard v. Binfield*, 10 *Ala. R.* 977. *Reid v. Campbell*, *Meigs' R.* 378. *McDaniel v. Douglas*, 6 *Humph. R.* 220. *Lewis v. Lewis*, 7 *Ired. R.* 72. *Hinton v. Hinton*, 6 *ib.* 274. *Welch v. Anderson*, 28 *Miss. R.* 293. *Vide also the statutes of the several states.*)

In New York the widow is entitled to dower, unless the provision be *expressly made in lieu of dower*, or be so repugnant to the other provisions of the will that they cannot stand together. (*Sandford v. Jackson*, 10 *Paige's Ch. R.* 266. *Fuller v. Yates*, 8 *ib.* 325. *Lewis v. Smith*, 9 *N. Y. R.* 502. *Lasher v. Lasher*, 13 *Barb. R.* 106.) And when the provision is in lieu of dower, the widow has one year in which to make her election. The fact that specific provisions made for the wife by the will exceed the value of her dower right is no reason for implying that the testator intended to bar her dower in the residue. (*Mills v. Mills*, 28 *Barb. R.* 454.) The intention of the testator, as gathered from the whole instrument, governs as to the question whether a legacy to the wife is in lieu of dower. If it is apparent that to allow the widow dower and the legacy in addition thereto would defeat or materially lessen the allotments to all or any of the devisees or legatees, the court will require the widow to elect. (*Dodge v. Dodge*, 31 *Barb. R.* 413.) And a similar doctrine is held in New Jersey. (*White v. White*, 1 *Harr. R.* 202.)

A devise of all the testator's property, real or personal, during widowhood, or during widowhood and the minority of children, and *then to be divided among the children* was held not to be a

devise in lieu of dower, so as to put the widow to her election. (*Sandford v. Jackson*, 10 *Paige's Ch. R.* 266. *Church v. Ball*, 2 *Denio's R.* 430.)

If the husband in his will gives a legacy to his wife on condition that she releases her dower, if she elect to take her legacy, and there is a deficiency of assets to pay all the legacies, her legacy will not abate. This is upon the principle that a devise implies a consideration. (*Morgan v. Edwards*, 1 *Dow. & Clark's R.* 104. *Smith v. Kiniskern*, 4 *Johns. Ch. R.* 9. *Adsit v. Adsit*, 2 *ib.* 448. *Wood v. Lee*, 5 *Mon. R.* 58. *Bailey v. Duncan*, 4 *ib.* 265. *Burridge v. Brady*, 1 *P. Wms. R.* 127.) But when the provision is in lieu of dower, the wife must elect, or she will be barred. (*Axtell v. Axtell*, 2 *Ch. Cas.* 24. *Lawrence v. Lawrence*, 2 *Vern. R.* 365. *Hitchin v. Hitchin*, *Prec. Ch.* 133. *Galter v. Hancock*, 2 *Atk. R.* 427. *Tinney v. Tinney*, 5 *ib.* 8. *Incedon v. Northcote*, 1 *b.* 436. *Ayres v. Willis*, 1 *Ves. R.* 230. *Charles v. Andrews*, 9 *Mod. R.* 152. *Broughton v. Erington*, 7 *Bro. P. C.* 12. *Herbert v. Wren*, 7 *Cranch's R.* 370. *Blunt v. Lee*, 5 *Call's R.* 481. *Roberts v. Smith*, 1 *Sim. & Stu. R.* 513. *Dickson v. Robinson*, *Jacob's Ch. R.* 503. *Rowley v. Dickson*, 3 *Russ. R.* 192. *Vide also Collins v. Carman*, 5 *Md. R.* 503.) Where the legacy is in lieu of dower the legatee is not compellable to contribute with the other legacies to the payment of debts due from the estate. (*Lord v. Lord*, 23 *Conn. R.* 327.) But the legatee in such case must contribute with all other legacies to make up the share of a post-testamentary child not provided for in the will. (*Mitchell v. Blain*, 5 *Paige's Ch. R.* 588.) The legatee, however, is treated as a purchaser in such a case, and is entitled to all the incidents resulting from that relation. (*Tift v. Porter*, 8 *N. Y. R.* 522.)

Where the widow elects to take the testamentary provision in lieu of dower, she takes the estate devised subject to all contingent charges upon it. (*Copp v. Hersey*, 11 *Foster's R.* 317.) The widow may renounce the provision made for her in lieu of dower, which has the effect to surrender her right to the heirs or devisees of her husband; and she may make this renunciation upon the condition that she die within the period of one year from the death of her husband. (*McCallister v. Brand*, 11 *B. Mon. R.* 325, 370.)

The intention of the testator is the pole-star in all these cases, as in all others which arise under wills; and this intention must be collected from the dispositions of the estate in the will.

(*Arnold v. Hemstead*, *Ambler's R.* 730. *Wake v. Wake*, 3 *Bro. Ch. R.* 255. *Boynnton v. Boynnton*, 1 *ib.* 445.) It is doubtful whether it must not appear from the terms of the will that the testator intended the devise to be in lieu of dower. But this is said to be at least certain, that the implication that the wife shall not have both the devise and dower, must be strong and necessary before the widow will be put to her election. (*Foster v. Cook*, 3 *Brown's Ch. R.* 347. *French v. Davis*, 2 *Vesey's R.* 572.) And it has been held that a widow shall in no case be forced to make her election until an account is taken and it is ascertained out of what estate she is dowable. (*Hall v. Hall*, 2 *McCord's Ch. R.* 280. And *vide Birmingham v. Kirwan*, 1 *Schoale's & Lefroy's R.* 444, 452. *Chalmers v. Storil*, 2 *Vesey & Beames' R.* 222. *Vide also Reeve's Domestic Relations*, 3d ed. 116-122.)

In the older cases the disposition to reject evidence of the testator's intention foreign to the will is much more emphatically expressed than in the modern ones. But, notwithstanding the older decisions to the contrary, the better opinion seems to be that evidence extraneous to the will is admissible, in general, to show the intention of the testator, where it cannot be gathered from the instrument itself. (*Druce v. Dennison*, 6 *Ves. R.* 385. *Pulteney v. Darlington*, 1 *Bro. Ch. R.* 118.)

Upon general principles, it may be affirmed that the right of the wife to dower in the estate of her husband cannot be absolutely and effectually barred by any testamentary or other provision without her consent.

§ 409. It may be remarked that, though the wife's dower may be barred by a jointure, yet her antenuptial covenant in a marriage settlement never to claim dower will not have that effect, even though it contain an agreement that it may be pleaded in bar of any action of dower, unless the consideration on which the covenant was founded has been performed. Thus, when, by an antenuptial indenture, the husband settled an annuity on the wife for her life, and she covenanted never to claim dower in his estate, and he afterward died insolvent, it was held that the covenant could not be set up by way of defense to her claim of dower; for, being of a future interest, it was not technically a release, and the consideration or condition apparent on the face of the instrument not having been performed, it could not operate either as an estoppel or by way of rebutter. (1 *Greenl. Cruise*, 203, citing *Hastings v.*

Dickinson, 7 *Mass. R.* 153. *Gibson v. Gibson*, 15 *ib.* 106, 110. *Vance v. Vance*, 8 *Shepl. R.* 364.)

It is not essential that the lands intended and secured as a jointure should be free of incumbrance; for if the incumbrance is paid off, the jointure remains good; and if the wife is evicted, she may claim her dower; otherwise her dower is barred or prevented. (*Ambler v. Norton*, 4 *Hen. & Munf. R.* 23.) Or, there is a proviso in the statute 27 *Henry VIII*, *ch.* 10, § 7, which has been adopted in most if not all of the United States, where the common law doctrine of dower is recognized: "That if any such woman be lawfully *expulsed or evicted* from her said jointure, or from any part thereof, without any fraud or covin, by lawful entry, or by discontinuance of her husband; then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was dowable, as the same land and tenements so evicted and expulsed, shall amount or extend unto;" and this is adopted as the rule where the common law doctrine with respect to dower prevails. (*Ambler v. Norton*, *supra*.)

If the wife is evicted of her jointure lands, she will have dower in other lands of her husband. The effect of eviction is to remit her to her dower *pro tanto*; if the value of the dower be greater than that of the jointure, she can recover only the amount of the latter; and if the jointure be greater, she can only recover to the amount of her dower; and she will only be permitted to hold the lands recovered during life, though the jointure might have been settled in fee or in tail. (1 *Greenl. Cruise*, 202. *Hastings v. Dickenson*, 7 *Mass. R.* 153. *Ambler v. Norton*, 4 *Hen. & Munf. R.* 23.) The consequences of eviction of equitable jointure seem to be the same as if it were legal. The widow, also, in case of eviction, may avail herself of any remedies she may have against her husband's assets, by covenant or otherwise. (*Ambler v. Norton*, *supra*.)

§ 410. When a jointure is settled on a woman before marriage, it so far resembles dower, that it cannot be defeated by the alienation of the husband alone, or be charged with any incumbrances created by him after the marriage.

A jointure is in several cases more favored in law than dower, and there are many things which bar dower, and acts of the wife by which she forfeits her claim to dower, which do not prevent her from enforcing her jointure. It is, however, expressly enacted in

some of the American States that a jointure, devise, or other provision in lieu of dower, shall be forfeited by any cause which would be a forfeiture of the dower at common law.

A general devise of other lands, or of personal property, by a husband to his wife, will not, independent of any statutory provision to the contrary, operate as a bar to a jointure settled on the wife either before or after marriage. (*Grove v. Hook*, 4 Bro. P. C. 593.) If, however, a devise was made expressly in bar of a jointure, or it should appear from any circumstances in the will that it was the intention of the testator that the devise was meant as a satisfaction of the jointure, the court would probably compel the jointress to make her election, in analogy with the cases in which a devise has been held a satisfaction of dower. Mr. Cruise refers to one case where there was a deficiency in a jointure, and the husband having devised lands to the jointress for her life, and also a sum of money, such devise and bequest were held to be a satisfaction for the deficiency of the jointure. (*Montague v. Maxwell*, 4 Bro. P. C. 598.) He does not seem, however, to be very well satisfied with the doctrine of the case, and suggests that it is not reconcilable to some other cases. (1 *Greenl. Cruise*, 221.)

Although a jointure be very unequal, and much in favor of the wife, yet the court will not relieve against it. (*Whitfield v. Taylor*, *Showers's Parl. Cas.* 20. *Wickerly v. Wickerly*, 2 P. Wms. R. 619. *Vide also Prime v. Stebbing*, 2 Ves. R. 409.)

In many respects a jointure and a devise in lieu of dower stand upon the same footing. Indeed, a provision for the wife by will is often called a jointure, and was originally upheld as a bar to dower, as being within the equity and reason of the statute of uses, which establishes jointures. (1 *Hilliard on Real Property*, 105.) A jointure is ordinarily settled *before* marriage, and a devise takes effect *after it is ended* by death. They are, therefore, held to stand on substantially the same ground. (*Vernon's case*, 4 *Coke's R.* 4.) There is this difference, however, as we have before seen, that a jointure, to be binding on the wife, must, in general, be made before marriage, and a provision for her after marriage may be accepted or rejected by the wife at her election. (*Vide Frank v. Frank*, 3 *Myl. & Cr. R.* 171.)

§ 411. With respect to the provision made for the wife after marriage, it has been held that the same will never be construed by implication to be in lieu of dower or the interest the law may

give her in the personal property not disposed of by the husband; and the provision must be fully enjoyed by the wife in order to bar her dower. Where, by an antenuptial agreement, a provision is made that the husband shall provide by will for an annuity to his widow for her life, with an interest in a certain part of his real estate, in lieu of dower or any portion of his estate, and the husband by will gives her an annuity only during her widowhood, he has failed to perform his part, and his widow is not precluded from claiming the property which by statute is to be set apart to her use. And it is held that the fact that she is in possession of the real estate and some personal property held by her before marriage, and secured to her by the agreement, claiming to hold them under it, will not prevent her from asserting her right. (*Sheldon v. Bliss*, 8 N. Y. R. 31.) This is upon the principle that the wife has a right to look to a performance and not to the mere covenant of her husband as a consideration of relinquishing claims upon her husband's estate, which would be effected by his death.

The right to dower being in itself a clear legal right, an intent by a testator to exclude it, or that it should be relinquished, must be demonstrated by express words or by manifest implication. In order to exclude it, the will itself should contain a provision inconsistent with the assertion of such legal right. (*Leonard v. Steele*, 4 Barb. R. 20, 22. *Birmingham v. Kirwan*, 2 Scho. & Lef. R. 452.) But when it clearly appears from a will that the testator has distributed the residue of his property, after making provision for his widow, amongst his children or other persons, in such proportions as he considered them entitled to; and that, to allow the widow to take both the provision of the will and her dower out of the estate, would defeat, or materially lessen, the allotments to all or any of the devisees or legatees, the intention of the testator not to give her both the provision and dower out of his estate is plainly manifested, and the court should require the widow to elect which she will take. (*Dodge v. Dodge*, 31 Barb. R. 413.)

Again, it has been decided that where a testator devised his real and personal estate to his wife during her life, or so long as she should remain his widow, and after her decease or remarriage, to his children, and the widow, having survived him, entered and occupied under the will for several years, and then married a second husband, she was entitled to dower. The widow's claim of dower is regarded with favor by the courts, and she will not be

deprived of it by accepting a testamentary provision in her favor, when it is doubtful whether or not the testator intended she should have both. The principle is reiterated that, in order that the provision bar her dower, the testator must declare his intention in terms that it shall, or the other provisions of the will must be totally inconsistent with the claim of dower. (*Church v. Bull*, 2 *Denio's R.* 430.)

So also where a testator devised all his property, real and personal, to his wife and to two other persons, to be kept for her use and support as long as she should continue his widow, and until his youngest child should become of age, and then directed that all his property should be divided equally among his children; and she survived the testator and afterward married a second time, it was held that the devise in her favor was not inconsistent with her claim of dower in the testator's real estate, after his youngest child arrived at the age of twenty-one, and that her acceptance of the devise was no bar to her claim of dower. (*Sanford v. Jackson*, 10 *Paige's Ch. R.* 266.)

But the provision made for the widow under a trust vesting the entire legal estate in trustees, is inconsistent with a right of dower, and in such a case the widow is bound to elect which she will take. (*Savage v. Burnham*, 17 *N. Y. R.* 561.)

The assignment of something to the wife in lieu of dower, with her consent and acceptance, must be of some part of the lands of which she is dowable, or a rent issuing out of them, and for such an interest as may endure for her life, or the same will be no bar to her claim of dower. In order to bar the widow of her action for dower, when rent has been assigned with her consent, and accepted by her, it must appear that the rent will endure for her life. (11 *Barb. R.* 574, 580.)

Where a testator by his will makes a provision for the benefit of his wife, and directs that such provision shall be received by her in lieu of all her dower or thirds in his real or personal estate, these words are not to be limited and restrained to the lands of which the testator was seised, but comprehend all the lands of which the testator was seised during the marriage, and in which his wife might be entitled to dower, so as to put the widow to her election between the provisions of the will and her dower in lands conveyed away by the testator during coverture. (*Palmer v. Voorhis*, 35 *Barb. R.* 479.)

A devise of the testator's whole estate to his widow for life, with remainders over, is not a provision in lieu of dower, unless such intention be implied from other terms of the will; and the widow under such a provision in the State of New York, may take one-third of the estate as doweress and the residue as devisee. (*Lewis v. Smith*, 9 *N. Y. R.* 502.) That the provision by will in lieu of dower must be positive and unconditional, and clearly intended to be in lieu of dower, in order to bar the widow of her dower or drive her to her election, is well settled by a long current of authorities, both English and American. (*Vide Holdrich v. Holdrich*, 2 *You. & Coll. R.* 18. *Lord v. Lord*, 23 *Conn. R.* 327. *Castore v. Castore*, 2 *Rich. Eq. R.* 23. *Buist v. Dawes*, 5 *ib.* 281. *Higginbotham v. Cornwell*, 8 *Gratt. R.* 83. *Gaw v. Huffman*, 12 *ib.* 628. *Thomas v. Wood*, 1 *Md. Ch. Decis.* 296. *Bailey v. Boyce*, 4 *Strobh. Eq. R.* 84. *Cornell v. Ham*, 2 *Iowa R.* 552. *Clark v. Griffith*, 4 *ib.* 405. *Sturgis v. Ewing*, 18 *Ill. R.* 176. *Borland v. Nichols*, 12 *Penn. R.* 38. *Morris v. Clark*, 2 *Stockt. R.* 51. *Van Arsdale v. Van Arsdale*, 2 *Dutch. R.* 404. *Fulton v. Fulton*, 30 *Miss. R.* 586. *Gibson v. Gibson*, 17 *Eng. L. & Eq. R.* 349. *Warburton v. Warburton*, 23 *ib.* 415. *Parker v. Sowerby*, 27 *ib.* 154. *Rathbone v. Dyckman*, 3 *Paige's Ch. R.* 9. *Wood v. Wood*, 5 *ib.* 596. *Fuller v. Yates*, 8 *ib.* 325. *Havens v. Havens*, 1 *Sand. Ch. R.* 324. *Lasher v. Lasher*, 13 *Barb. R.* 106. *Tobias v. Ketcham*, 36 *ib.* 304.)

In South Carolina it has been held that a widow's acceptance of her distributive share of the personalty of her husband dying intestate, bars her dower in both the realty aliened and in which he was seised at the time of his death. (*Evans v. Pierson*, 9 *Rich. Law R.* 9.)

§ 412. Dower will be defeated by a sale of real estate after the marriage, under an execution upon a judgment rendered against the husband prior to the marriage, even when sought to be recovered by an action at law. So held upon the authority of Kent, that "as a general principle, it may be observed that the wife's dower is liable to be defeated by every subsisting claim or incumbrance, in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin." (*McClure v. Harris*, 12 *B. Mon. R.* 261. *Stribling v. Ross*, 16 *Ill. R.* 122. *Trustees of the Poor of Queen Anne's County v. Pratt*, 10 *Md. R.* 5. *Mantz v. Buchanan*, 1 *Md. Ch. Decis.* 202. *Brown*

v. *Williams*, 31 *Maine R.* 403. *Clough v. Elliott*, 3 *Foster's R.* 182. *Sandford v. McLean*, 3 *Paige's Ch. R.* 117. *Scott v. Howard*, 3 *Barb. R.* 319.) The same doctrine is more broadly affirmed by Judge Sherman, in a case in the Ohio supreme court, where he says, in speaking of the widow's right of dower: "Her estate is but a part of his, is derived from him, and must be subject to all incumbrances existing against it at the time of the marriage, or the acquisition by the husband. The husband can, by no act of his, destroy or affect her right of dower where it has once attached, but it only attaches when he has a real beneficial interest in the lands of which dower is claimed." (*Greene v. Greene*, 1 *Ohio R.* 535, 542.) Dower is likewise barred by a valid sale and conveyance of land, by the proper officer, for the non-payment of taxes. (*Jones v. Devore*, 8 *Ohio St. R.* 430.)

So, by the rules of the common law, dower will be defeated where the estate of the husband is conditional, and is defeated or determined by re-entry on account of non-performance of the condition by the husband. This must be the natural consequence arising out of the nature of such an estate. The same act which conveys the estate to the husband creates in the wife the only right of dower which she can claim. The dower right in the wife is an incident, merely, of the conditional estate of the husband, and it would seem to follow as a necessary consequence that it should itself be conditional. (*Beardslee v. Beardslee*, 5 *Barb. R.* 324, 333.)

Although the policy of the law has always been to preserve with great care the right of dower, when it has once attached to the property of the husband, yet it has never gone so far as to attach the right of dower to property other than the husband's. Whilst it is reasonable that, in case of the death of the husband, a support for the wife should be provided out of his estate, it is neither reasonable nor legal that such support should be provided out of the property and rights of others. In order to avoid this, it has been found necessary that the right of dower should attach subject to all equities that may exist against the title of the husband at the time it attaches. The right of dower arises alone upon the title of the husband, and cannot be higher or more extensive than it. Therefore, it has been held, that where the legal title is in the husband, and the equitable title in another, at the time of the marriage, no right of dower attaches as against such equitable title; and when the equitable title is asserted, the right of dower is

defeated. (*Firestone v. Firestone*, 2 *Ohio St. R.* 415. *Rawlings v. Adams*, 7 *Md. R.* 26. *Bowie v. Berry*, 3 *Md. Ch. Decis.* 359.)

§ 413. As a general rule, a divorce *a vinculo matrimonii* bars the wife's claim to dower, for it is said that the party claiming dower must have been the wife at the death of the husband. (*Burdick v. Briggs*, 11 *Wis. R.* 126. *Dobson v. Butler*, 17 *Miss. R.* 87.) This would seem to be a very proper rule, where, as in the States of Massachusetts and New York, it is limited to a case of divorce *a vinculo* for the misconduct of the wife, or on conviction of adultery on a bill by the husband for a divorce. (*Davol v. Howland*, 14 *Mass. R.* 219. *Lakin v. Lakin*, 2 *Allen's R.* 45. *Wait v. Wait*, 4 *N. Y. R.* 25.) But it is more questionable, when it is carried to the extent of depriving the wife of her dower, when *she* has obtained a decree for a divorce *a vinculo matrimonii*, for the adultery of her husband. (*Wait v. Wait*, 4 *Barb. R.* 192. *Forrest v. Forrest*, 6 *Duer's R.* 102, 153. *Rice v. Lumley*, 10 *Ohio St. R.* 596.) In such a case, however, the dower is not lost by way of forfeiture, but because the woman cannot be considered the *widow* of the man from whom she has been absolutely divorced. By the decree, the marriage between the parties is dissolved, and each party freed from the obligations thereof. Besides, in such cases, as a general rule, the court is required to compel the defendant to provide, not only for the children of the marriage, but a suitable allowance for the support of the complainant for life, and to give security therefor. And the divorced wife is also at liberty to marry again, to seek another protector, to become the doweress of the lands of another. In this view, there is, perhaps, nothing unjust or harsh in the rule, when carried to its logical consequence, which deprives the wife of her dower in the lands of the man from whom she is absolutely divorced, whichever party may have applied for the divorce.

It seems that an absolute divorce will deprive the wife of her dower, as well when it is granted by legislative enactment as by the decree of a competent court. (*Levins v. Sleator*, 2 *Greene's [Iowa] R.* 604.) And a decree of divorce unappealed from and unreversed, has been held to be an absolute bar of the wife's dower in her divorced husband's property. (*Miltimore v. Miltimore*, 40 *Penn. R.* 151.)

In the State of Ohio it is held that a divorce in another state, for *willful abandonment* by the husband, is no bar of dower in

Ohio lands; and this is undoubtedly the rule in all of the states where willful abandonment is not a legal cause for an absolute divorce. (*Mansfield v. McIntyre*, 10 *Ohio R.* 27.)

Says Bishop, in his treatise upon the law of marriage and divorce: "The common law of this country is clearly established, that no woman can have dower in her husband's lands unless the coverture was continuing at the time of his death. The reason appears to be that, as the English common law never recognized any right of dower unless the woman were covert when the husband died, our courts cannot create such a right in her by construction, merely because, in consequence of a legislative enactment, she is found in circumstances unknown to the common law." (2 *Bish. on Mar. and Div.* § 706, referring to *Given v. Marr*, 27 *Maine R.* 212. *McCafferty v. McCafferty*, 8 *Blackf. R.* 218. *Clark v. Clark*, 6 *Watts & Serg. R.* 83, 88. *Cunningham v. Cunningham*, 2 *Ind. R.* 233. *Whitsell v. Mills*, 6 *ib.*, 229. *Miltimore v. Miltimore*, 40 *Penn. R.* 151. *Burdick v. Briggs*, 11 *Wis. R.* 126. *Rice v. Lumley*, 10 *Ohio St. R.* 596. *McCraney v. McCraney*, 5 *Iowa R.* 232.) "But in many or most of the United States," he adds, "it is provided by statute that, when the wife is the innocent party, she shall be entitled, immediately on the divorce, to dower in the lands of the husband, in like manner as if he were dead. In such cases, the dower is not to be set off to her in the divorce suit, but she is to recover it by the same process she would if he had died." (2 *Bish. on Mar. and Div.* 709.)

And in a late case in the court of appeals of the State of New York, it was held that a divorce dissolving the marriage contract on the ground of the adultery of the husband, does not deprive the wife of her right of dower in his real estate. The learned judge who delivered the opinion of the court concluded by saying: "My conclusion, therefore, is that the common law doctrine, *ubi nullum matrimonii ibi nulla dos*, is not applicable to a divorce which admits the validity of the marriage, and dissolves it for some subsequent cause, as adultery. It is conceded that a divorce under the statute has no retroactive effect. Its operation is specifically defined. It has no other effect than that declared by statute. When the wife is the complaining party, if she obtains a decree, the marriage is so far dissolved as to release the parties from the duty of mutual cohabitation, and, so far as her own property is concerned, the wife is as far as practicable restored to the position

in which she stood before the marriage. But in respect to the husband's property, her rights are not changed. She is still entitled to a support while the husband lives, and her dower in case she survives him. She and her children, alike unoffending, retain the same rights as if her husband had been faithful to his obligations. His offense works no forfeiture of their rights. The children will still inherit as heirs at law, and when they inherit she may be endowed. The only difference is that they inherit the lands not devised of which the father at the time of his death was seised, while she is endowed of all the lands of which her husband was seised at any time during coverture." (*Wait v. Wait*, 4 *N. Y. R.* 95, 109.)

A divorce *a mensa et thoro*, from bed and board, does not at common law change the relation of the parties, and consequently the wife is entitled to dower in her deceased husband's estate, the same as though the marriage relation had not been disturbed. (*Kruger v. Day*, 2 *Pick. R.* 316. *Dean v. Richmond*, 5 *ib.* 461. *Clark v. Clark*, 6 *Watts & Serg. R.* 85. And *vide Potier v. Barclay*, 15 *Ala. R.* 429. *Gee v. Thompson*, 11 *La. An. R.* 657.) In some of the states, however, the same rule with respect to dower applies in cases of divorce *a mensa et thoro* as in divorce *a vinculo matrimonii*, and dower is barred in both cases.

In New York it has been held that the court has no authority in an action by the wife against the husband for a divorce *a mensa et thoro*, to require her to accept a gross sum from her husband in lieu of and in satisfaction of her dower; and her acceptance of such sum in the life-time of her husband will not defeat her dower. (*Crain v. Cavana*, 36 *Barb. R.* 410.)

§ 414. By the common law, the adultery of the wife bars her dower, and in England it is held that her adultery bars her dower although she was previously driven to leave her husband by cruelty. (*Woodward v. Dowse*, 10 *Com. Bench. R. [N. S.]* 722. The rule, however, under the statute of 13 Edw. I, ch. 34, was, that "if a wife *willingly* leave her husband, and go away, and continue with her adulterer, she shall be barred forever by an action to demand her dower;" and this is still the rule in many of the states, while, in several of the states, the adultery must be established by the decree of a competent court. Indeed, it would seem that previous to the statute of 13 Edw. I, adultery did not work a forfeiture of the wife's dower at common law. (*Reynolds v. Reynolds*, 24

Wend. R. 193-197. *Cooper v. Whitney*, 3 *Hill's R.* 95. *Cogswell v. Tibbetts*, 3 *N. H. R.* 41. *Bell v. Neeley*, 1 *Bailey's R.* 312. *Cochrane v. Libby*, 18 *Maine R.* 39. *Stigall v. Stigall*, 2 *Brock. R.* 256.) But the statute of 13 Edw. I is understood to be the common law of the United States; and it was said by Willes, J., in the case of *Woodward v. Dowse*, *supra*: "The best construction of the statute seems to be, that the leaving *sponte* is not the essence of the offense which leads to the forfeiture. It is enough, if, having left her husband's house, the woman afterward commits adultery." This was said in 1861; but in a case decided in the same court more than thirty years previous, *Tindal*, Ch. J., after examining the cases upon the subject, said: "The authorities, therefore, above referred to, place the forfeiture of the dower upon the fact of a living from the husband in adultery, and not upon the circumstances attending the elopement; and as we think the good sense and reason of the case concur with these authorities, we hold the proper construction of the statute to be what the words still warrant, that if a woman leaves her husband with her own free will, and afterward lives in adultery, the dower is forfeited." (*Hetherington v. Graham*, 19 *Eng. C. L. R.* 31.) The same doctrine prevails in the State of North Carolina, where *Ruffin*, Ch. J., approved of the rule laid down in *Hetherington v. Graham*, saying it "is also a clear authority and upon sound reason, that there need not be any adultery, before the wife leaves her husband, nor any elopement with the man with whom she afterward commits adultery; but that she is barred by adultery with any person, entirely supervenient on a separation by mutual consent;" holding, however, that in order to support a bar to the claim of dower, it must appear that the wife *willingly* left her husband; and if *driven* away by the husband, or by his compulsion, the wife does not forfeit her dower. (*Walters v. Jordan*, 13 *Ired. Law. R.* 361.)

Chief Justice Marshall said: "The words 'and go away and continue with her adulterer,' would, I am inclined to think, be satisfied by an open state of adultery, whether the woman resided in the same house with her adulterer, or in separate houses; whether in her own or a friend's house, or in his; whether with or without the ceremony of marriage." (*Stigall v. Stigall*, 2 *Brock. R.* 256, 260.) But, on the contrary, it was early held by the superior court of New Hampshire that the wife does not forfeit her right of dower by committing adultery, unless she elopes with

the adulterer. (*Cogswell v. Tibbetts*, 3 *N. H. R.* 41.) And, as was before shown, in New York and Massachusetts, elopement with an adulterer is not a bar to dower, unless followed by a divorce. (*Reynolds v. Reynolds*, 24 *Wend. R.* 193. *Lakin v. Lakin*, 2 *Allen's R.* 45.) The rule is the same in Rhode Island. (*Bryan v. Batcheller*, 6 *R. I. R.* 543.) It is nowhere held that mere separation, however unjustifiable, without adultery, will prevent dower; but, on the contrary, it has been expressly held that it will not have that effect. (*Thayer v. Thayer*, 14 *Vt. R.* 107.) In the State of Alabama, dower has been refused where both parties had been guilty of adultery, but no divorce had taken place. (*Ford v. Ford*, 4 *Ala. R.* 142.)

§ 415. When the husband and wife enter into a post-nuptial agreement, in view of a voluntary separation, whereby, for a consideration which, in the light of all the circumstances of the parties at the time the contract is made, is fair, reasonable and just, the wife relinquishes all claim to dower in her husband's estate, and the same is fully executed on the part of the husband, it has been held that the court will uphold and enforce the contract in equity, and bar the wife's dower. (*Miller v. Miller*, 16 *Ohio St. R.* 527.) But an agreement not under seal between the husband and wife to live separate and apart, and that neither shall claim any interest in the other's property, is not a bar to the wife's dower. (*Walsh v. Kelley*, 34 *Penn. R.* 84.) And an arrangement by which the husband and wife separate and live apart, and the husband conveys to the wife a separate estate, does not bar her claim to dower. (*Watkins v. Watkins*, 7 *Yerg. R.* 283.) When the widow knowingly permits the purchaser to part with his money for real estate under the assurance that the land is free from her claim of dower therein, and she accepts and enjoys the use of the whole purchase-money, as a bequest under the will of her husband, such acts on her part constitute an *estoppel in pais*, and she will not be permitted to set up a claim to dower in the premises. (*Wood v. Seely*, 32 *N. Y. R.* 105. *But vide Lawrence v. Brown*, 5 *ib.* 394. *Heth v. Cocke*, 1 *Rand. R.* 344.) The heirs of a grantor cannot set up against a claim of dower by his widow, their liability to the grantee upon a covenant of warranty in a deed of the land in which the dower is sought. (*Hill v. Golden*, 16 *B. Mon. R.* 551.) And the plea that the defendant had a large claim against the husband, who owned a large personal estate at the time

of his death, which the widow had converted to her own use, is not sufficient to bar the widow's dower. (*Kennedy v. McAuley*, 9 *Rich. Law R.* 395.) Neither is it a defense to the widow's claim for dower that the purchaser bought without any notice of such claim, and paid a full consideration for the property. (*Campbell v. Murphy*, 2 *Jones' Eq. R.* 357.)

Dower is connected with and inheres in the title of the heirs, and that which bars the right of the heirs bars the widow's right to dower. Where the land of the deceased husband was sold under a void judgment, and the possession voluntarily relinquished by the widow, who failed to assert her right to dower by suit for twenty years, it was held that she was barred of her right. (*Carmichael v. Carmichael*, 5 *Humph. R.* 96.) A similar rule prevails in the State of New York. (*Sayre v. Wisner*, 8 *Wend. R.* 661.)

CHAPTER XXIX.

ASSIGNMENT OF DOWER—THE WIDOW'S INTEREST IN THE ESTATE BEFORE ASSIGNMENT—PRINCIPLES AND MODE OF ADMEASUREMENT AND ITS EFFECT—THE METHOD OF OBTAINING THE LAND ASSIGNED—THE WIDOW'S ESTATE ACQUIRED BY THE ASSIGNMENT.

§ 416. UPON the death of the husband, the right to dower which the wife acquired by her marriage becomes consummate. But, unless the precise portion of land which she is to have is particularly specified as in dower, "*ad ostium ecclesiæ*," and "*ex assensu patris*," she is not entitled to enter upon her third or other part of the estate until her dower has been duly assigned to her by the heir or other competent authority. This is required, it is said, not only for notoriety to the public; or to the owner of the lands, to enable them to implead the tenant, but also to entitle the lord of the fee to demand the heirs' services in respect of the estate so held. This consideration, however, is of no moment at the present day. The widow is entitled to be endowed immediately after her husband's death; and, strictly speaking, her dower ought to be assigned to her within forty days after the happening of that event. In the mean time she is entitled, at common law, to remain in her

husband's dwelling-house, of which she is dowable, for the space of forty days, and to be supported *de bonis viri*. This right of residence is called the widow's quarantine. But if she marry during these days, or depart from her husband's house, her right to quarantine determines.

In the State of Maine, the widow, though entitled to dower, has no claim to occupy any part of the estate until her dower has been assigned (*Bolster v. Cushman*, 34 *Maine R.* 428); while in New York it is provided by statute that a widow may tarry in the chief house of her husband forty days after his death, whether her dower be sooner assigned to her or not, without being liable to any rent for the same, and in the mean time she shall have her reasonable sustenance out of the estate of her husband. (1 *R. S. part 2, ch. 1, tit. 3, § 17*. 1 *Stat. at Large*, 693.) And unless her dower is assigned to her within the forty days, she may take measures to have her dower admeasured. (2 *R. S. part 3, ch. 8, tit. 7, § 1*. 2 *Stat. at Large*, 510. *Ward v. Kilts*, 12 *Wend. R.* 137.) The widow, after her quarantine of forty days has expired, has no right to the possession of the premises of which her husband died seised, and no right to enter thereon for her dower before it has been assigned to her. (*Corery v. The People*, 45 *Barb. R.* 262.) The widow's quarantine, which was a provision originally of magna charta of England, is recognized in most of the United States, and it is certainly a very proper and humane provision. (*Vide Bank of U. S. v. Dunseth*, 10 *Ohio R.* 18. *Barnet v. Barnet*, 15 *Serg. & Rawle's R.* 71. *McCully v. Smith*, 2 *Bailey's R.* 103.)

In pleading quarantine, the widow must show with certainty the period when her husband died and the time of the forty days after. (*Kettillsby v. Kettillsby*, *Dyer's R.* 76.)

§ 417. It may be proper, though perhaps unnecessary, to remark that the incipient or inchoate right of dower becomes consummated and perfected only upon the *natural* death of the husband. It was anciently contended that the *civil* death of the husband would entitle the wife to her dower, and that upon the happening of that event, she could at once proceed to have her dower admeasured. Lord Eldon said: "In the case of abjuration, and in those other cases which amount to a civil death, I think that I understand the situation in which the wife was placed. The husband being civilly dead, the wife was entitled to dower of his land

in the same manner as if he were actually dead." (*Marsh v. Hutchinson*, 2 Bos. & Pull. R. 226-231.) And this position was supported by the authority of Bracton and Fleta, in whose books the wife seems to have been considered as equally entitled to dower in the case of a civil as of a natural death. The same doctrine was intimated in one case in the State of South Carolina, where the court held that if the husband be banished, he "is considered as *civiliter mortuus*, and such rights as would have survived to him on the death of his wife are extinct, and gone with him." (*Wright v. Wright*, 2 Dessau. R. 242, 244.) But it is usually held, in the absence of any statutory provision, that nothing short of the natural death of the husband will entitle the wife to have her dower set off to her. (*Vide Frazer v. Fletcher*, 17 Ohio R. 260. *Wooldridge v. Lucas*, 7 B. Mon. R. 49.)

In several of the states, however, the wife is entitled by statute, for certain causes, to demand her dower in the life-time of her husband. Thus, in the State of Maryland, if the husband is guilty of polygamy, "his first wife shall, on his conviction, be forthwith endowed of one-third part of his real estate, which she shall hold as tenant in dower, the assignment of which shall be made as prescribed by law in other cases of dower, and she shall have the like remedy for the recovery thereof; and she shall also, on his conviction, be forthwith entitled to one-third part of his personal estate, in the same manner as if such husband had died intestate and she had survived him, which third part shall be divided and allotted to her in the same manner as distribution is made of the personal estate of intestates." (1 Md. Code, p. 207, § 11.)

In the State of Michigan, upon the conviction of the husband for a felony, whereby he is sentenced to imprisonment for the term of his natural life, his wife is entitled to dower in the same manner as if he was actually dead. (2 Comp. Laws, p. 957, § 24.) And the wife is also entitled to her dower in that state when a divorce is decreed by reason of the adultery of the husband. (*Ib.*)

In the State of Wisconsin, when the husband is sentenced to imprisonment for a term of three years or more, or when the wife is divorced from her husband on account of his adultery, she is at once entitled to her dower, the same as though her husband was dead. (R. S. 1858, p. 626, § 25.) And the law is the same in Minnesota. (R. S. 1859, p. 466, § 24.) And the same in the State of Oregon. (Gen. Stat. 1864, ch. 5. § 495.)

In the State of Massachusetts, when a divorce is granted by reason of the adultery of her husband, the wife is at once dowable in his lands as if he was dead. (*Gen. Stat.* 1860, p. 535, § 38. *Vide Davol v. Howland*, 14 *Mass. R.* 219.) And in Maine the wife is dowable when divorced from her husband for his fault. (*R. S.* 1840-41, p. 608, § 10. *Young v. Gregory*, 46 *Maine R.* 475. *Harding v. Alden*, 9 *Greenl. R.* 140.)

§ 418. The right of dower becomes consummate upon the death of the husband or other event referred to, but the widow cannot enter for her dower until it is assigned—until assignment she has no estate in the land, for the law casts the freehold on the heir immediately upon the death of the ancestor. Before the dower is assigned, the widow's right is a mere chose in action or claim, which she cannot assign or convey, though she may release it. (*Croade v. Ingraham*, 13 *Pick. R.* 33. *Lawrence v. Miller*, 2 *N. Y. R.* 245. *Stewart v. McMartin*, 6 *Barb. R.* 438. *Green v. Putnam*, 1 *ib.* 500. *Scott v. Howard*, 3 *ib.* 319. *Siglar v. Van Riper*, 10 *Wend. R.* 414.) This is the doctrine in New York, and the same rule is recognized in the State of Illinois, where it has been expressly held, that until assignment the right of dower is inchoate, and is not the subject-matter of sale or transfer; the only use the widow can make of her dower interest, is to release it to the owner of the fee, until it has been set apart to her. It was further held that until dower has been assigned, the doweress does not acquire a right of entry; and this is the doctrine of the common law. (*Hoots v. Graham*, 23 *Ill. R.* 81. *Blair v. Harrison*, 11 *ib.* 384.) So also a similar doctrine prevails in the State of Kentucky, where it is held that until the widow's dower is assigned, she has only the right of *quarantine*, and no such interest in the land of her deceased husband as may be sold on execution, or enable her to make a lease or bring ejectment. (*Shield v. Batts*, 5 *J. J. Marsh. R.* 13.) And the doctrine is general that the widow's dower cannot be sold on execution against her until it has been assigned; and the widow cannot release it even to a stranger. But after it is assigned, then, of course, it becomes the subject-matter of sale and transfer. (*Gooch v. Atkins*, 14 *Mass. R.* 378. *Nason v. Allen*, 5 *Greenl. R.* 479. *Johnson v. Shields*, 32 *Maine R.* 424. *Summers v. Bubb*, 13 *Ill. R.* 483.) Before the dower is assigned, however, it would seem that the widow can make a contract concerning it, which a court of equity will enforce. (*Potter v. Everett*,

7 *Ired. Eq. R.* 152.) But in Alabama it has been held, that if a widow, before her dower is allotted to her, convey her interest in the lands of her deceased husband, the heir at law may recover in ejectment against the alienee. (*Wallace v. Hall*, 19 *Ala. R.* 367. *But vide Powell v. Powell*, 10 *ib.* 900.) So also the doctrine has been recognized in Alabama, that until the widow's dower is assigned her, she has not such a legal title in the estate of her deceased husband as can be sold on execution at law. (*Cook v. Webb*, 18 *Ala. R.* 810.) In Pennsylvania, however, the widow's statutory dower is not treated as a lien upon the land, but as an interest in it. Her right attaches immediately upon the death of her husband, and she may be endowed temporarily. (*Schall's appeal*, 40 *Penn. R.* 170. *Price v. Johnston*, 4 *Yeates' R.* 526.)

It has been decided in general terms that a wife has no vested right, of any kind, to dower in the estate of her husband before his decease, and until then, her right may be modified, changed, or abolished by the legislature. (*Barbour v. Barbour*, 46 *Maine R.* 9.)

In Iowa, it is held that the widow's dower attaches on the death of her husband, and before it is assigned. (*Burke v. Barron*, 8 *Clarke's R.* 132.) And in the State of Ohio, it has been held that a conveyance by the widow before assignment of her dower is not void, and will not be set aside on application of a purchaser who has entered and enjoyed; he can only claim a perfect release after the assignment. The same rule, however, as to alienation is recognized as that which prevails in New York, Massachusetts and Illinois. (*Todd v. Beatley*, *Wright's R.* 561. *Douglass v. McCoy*, 5 *Ohio R.* 527.) But the general doctrine is, that the widow has no estate in the lands which she can assign or transfer until her dower is assigned; and if no assignment is made before her death, all right is gone. (*Rowe v. Johnson*, 19 *Maine R.* 146. *Sandback v. Quigley*, 8 *Watts' R.* 460. *Vide also Johnson v. Thomas*, 2 *Paige's Ch. R.* 377. *Atkins v. Yeomans*, 6 *Metc. [Mass.] R.* 438.) But if the widow is in possession, or is entitled to an assignment of dower immediately, the want of a mere formal assignment of her dower is not material in equity; and her interest in such case may be reached upon a creditor's bill and applied to the satisfaction of the complainant's judgment. (*Tompkins v. Fonda*, 4 *Paige's Ch. R.* 448.) So also in equity the assignee of a right of dower may state the assignment, and sue in his own name as assignee; but the right to be perfected is still the assignor's

right, and being a legal and not an equitable one, is subject to all the incidents which would at law attach to it, and, among other things, to the legal rule for applying the statute. The case is as though the doweress herself were the complainant in the bill. (*Wilson v. McLenaghan*, *McMullan's Eq. R.* 35. *Vide also Robin v. Flanders*, 33 *N. H. R.* 524.) But the rule at law is, that the widow does not acquire a vested estate in the lands which enables her to sustain an action, or which she can transfer, until her dower is assigned, as before stated. (*Vide, additional, Doe v. Nutt*, 12 *Eng. C. L. R.* 205. *Jackson v. O'Donaghy*, 7 *Johns. R.* 247. *Jackson v. Aspell*, 20 *ib.* 411. *Jackson v. Vanderheyden*, 17 *ib.* 167. *Chapman v. Armstead*, 4 *Munf. R.* 382. *Moore v. Gilliam*, 5 *ib.* 346. *Johnson v. Morse*, 2 *N. H. R.* 49. *Shiffer v. O'Neil*, 9 *Mass. R.* 13. *Brown v. Adams*, 2 *Whart. R.* 188. *McCully v. Smith*, 2 *Bailey's R.* 103. *Shield v. Bates*, 5 *J. J. Marsh. R.* 15.) The same authorities show that after the expiration of her quarantine, the heir may put the widow out of possession, and drive her to her suit for dower.

However, in several of the states, the widow, if in possession, cannot be ousted until her dower is assigned; and she is deemed a tenant in common with the heirs to the extent of her rights. This is the rule in Virginia, Kentucky, Connecticut, Rhode Island, New Jersey, Alabama, Illinois and Missouri. (*Den v. Dod*, 1 *Halst. R.* 367. *Stedman v. Fortune*, 5 *Conn. R.* 462. *Crocker v. Fox*, 1 *Root's R.* 227. *Calder v. Bull*, 2 *ib.* 50. *Stokes v. McAllister*, 2 *Missouri R.* 163. *Pharis v. Leachman*, 20 *Ala. R.* 662. *Springle v. Shields*, 17 *ib.* 295. *Shelton v. Carrol*, 16 *ib.* 148. *Singleton v. Singleton*, 5 *Dana's R.* 89. *Rambo v. Bell*, 3 *Kelly's R.* 207.) But in all or nearly all of the other states, the widow is only entitled to remain in possession of the husband's mansion during her quarantine before referred to.

§ 419. The interest which the wife has in this country in the estate of her deceased husband differs materially from her right at common law. By the common law she is entitled to one-third part of such lands and tenements as her husband was seised of in fee during coverture; while in some of the States she takes one-third of the profits of his estate, and if there are children one-half; in others she has the same right *in fee*, and if there are no kindred, she takes the whole; and still in others she has two-thirds, if there are no lineal ascendants or descendants, or brothers and sisters of the half

blood. More generally, however, the widow has, for her *dower*, one-third part of the real estate of which her husband was seised during coverture, or, as in some instances, of which he died seised. The other modifications of the common law with respect to the interest which the wife has in her deceased husband's lands, relate usually to an estate in addition to or in lieu of her dower. But whatever the share may be which the widow takes as her dower, the common doctrine of its assignment will generally apply.

§ 420. The assignment of dower may be made by the heir, or whoever may be the owner of the freehold; it being settled that no person can assign dower who has not a freehold in the estate, or against whom the writ of dower does not lie. For this reason, a guardian in socage cannot assign; neither can a tenant for years, since he is possessed of only a chattel interest. If the heir be a minor, he is, notwithstanding, competent to the assignment of dower; because he would be obliged to do so in a suit in which he would not be permitted to take advantage of infancy, so as to prevent an immediate assignment. (*Gere v. Perdue*, Cro. Eliz. 309. *Stoughton v. Lee*, 1 Taunt. R. 402.) The infant, however, should make the assignment by guardian. (*Jones v. Brewer*, 1 Pick. R. 314.) But if the heir were under age, when he assigned dower, he will be protected against the consequences of excessive assignments, and may have his writ of admeasurement of dower. He cannot, however, defeat the assignment by entry. (1 Greenl. Cruise, 171.)

By the former practice in England, it was regarded as the duty of the heir in common cases, as lord of the manor, and who was to create the tenure, to assign the dower. If there was any dispute as to the quantity of land assigned, it was determined by the *pares curiæ*, in the court baron; but the suit might be removed to the county court, and also to the king's court; and probably this is the practice there at present. (1 Greenl. Cruise, 169.)

It is not necessary to the validity of the assignment that the estate in the person making it should be a lawful freehold, because assignment of dower is a legal obligation upon the tenant of the freehold, whether he obtain it by right or by wrong; and if by wrong, the widow is not obliged to wait for an assignment until the heir thinks proper to enter and defeat the tortious estate, an event which may never happen. If, therefore, the land is in possession of an intruder or other wrongful occupant, he may make

the assignment, and it will be binding upon the lawful tenant, unless he is in possession by the connivance of the widow for the purpose of obtaining dower.

When the husband has conveyed his lands to different persons in severalty, and one of the grantees assigns to the widow in satisfaction of her whole dower, the other grantees cannot avail themselves of the assignment. The rule is different when a part of the land descends to the heir, and he makes an assignment in satisfaction of the whole dower. In such case the grantee of another portion of the land may plead the assignment in bar, because there is a privity between the heir and the grantee. (*Co. Litt.* 35.) However, in several of the American States, as in Virginia, Kentucky, Missouri, New Jersey and Delaware, it is provided by statute that it shall be no defense to a suit for dower that another person has assigned it, unless the assignment be shown to be in satisfaction of dower from the lands in question. (1 *Hilliard on Real Property*, 142.) Provision is made by statute in all of the states for the assignment of dower, but this does not affect the right of the heir to assign it himself. (*Moore v. Waller*, 2 *Rand. R.* 418.)

§ 421. Dower may be assigned *in pais* by the party authorized to make it. The widow being entitled of common right, nothing is required but to ascertain her share; and when that is accomplished by the assignment, and she has entered, the freehold vests in her without livery of seisin or writing. (*Rowe v. Power*, 5 *Bos. & Pull. R.* 1, 34.) A parol assignment is generally regarded as sufficient in the United States, although in Ohio, and perhaps in some other of the states the assignment must be by deed. (*Vide Robinson v. Miller*, 1 *B. Mon. R.* 88. *Conant v. Little*, 1 *Pick. R.* 189. *Shattuck v. Gregg*, 23 *ib.* 88. *Johnson v. Morse*, 2 *N. H. R.* 48. *Pinkham v. Gear*, 3 *ib.* 163. *Baker v. Baker*, 4 *Greenl. R.* 67. *Johnson v. Neil*, 4 *Ala. R.* 166.)

If the owner of land assign dower therein to a widow by parol, he will, as against her, be bound by the assignment. The assignment is certainly good as between him and the doweress. (*Shattuck v. Gregg*, 23 *Pick. R.* 189.)

If an assignment of dower by the heir or other person liable to have it demanded from him, was a conveyance to the widow, the statute of frauds would undoubtedly require it to be made by an instrument in writing or by deed, but it is not a conveyance; the

widow, holding her estate by law and not by contract, wants nothing but to have that part which she is to enjoy set out and distinguished from the rest, and this may be done by setting it out by metes and bounds, as well as by deed. The widow does not hold the land or her estate of the heir, but of her deceased husband, or rather by appointment of law. If she received land that was not her husband's, or other thing, in lieu of dower, a deed would be necessary, because she would derive her title from the person making the conveyance in lieu of dower. But her estate does not depend upon the heir, but upon the seisin of her deceased husband; so that the assignment of her dower may be made by parol as well as by an instrument in writing. (*Conant v. Little*, 1 Pick. R. 189.) By the assignment the widow acquires no new freehold, but her seisin is a continuation of the husband's seisin, and her possession is not adverse to her husband's mortgagee or his assignee. (*Williams v. Bennett*, 4 Iredell's R. 122. *Jones v. Brewer*, 1 Pick. R. 317.) It would be quite well in all cases to have the assignment in writing, to save all dispute as to the extent of the land set off, and sometimes this is required, but generally a parol assignment is sufficient. Formerly, as a general thing, dower was assigned by the heir by a parol declaration that the widow should have such particular lands for her dower; or else that she should have a third part of all lands whereof her husband died seised. (*Booth v. Lambert*, Style's R. 276.) And the heir has the whole of the *quarantine* of the widow within which to make the assignment. It is his duty, and not that of the widow, to make it, and if he neglects it, and a suit is brought, and he is subjected to costs or damages, it is his own fault, and not the fault of the law. (*Yates v. Paddock*, 10 Wend. R. 529, 534.) But a parol assignment of dower does not bind the widow until it is accepted. (*Johnson v. Morse*, 2 N. H. R. 48.)

§ 422. When the heir or other tenant of the land refuses to assign the dower, the widow has her action at law by writ of dower, *unde nihil habet*, or by writ of right of dower against the tenant of the freehold. The writ of right of dower, however, is scarcely known in this country, or at all events is seldom resorted to here. (4 Kent's Com. 63.) The writ *unde nihil habet* is to be preferred, because the widow under that recovers damages for the non-assignment of her dower. This writ is the only one provided in Maine, Massachusetts, Virginia and Kentucky. The writ lies only against a tenant of the freehold. (*Miller v. Beverly*, 1 Hen. & Munf. R.

368. *Hurd v. Grant*, 3 *Wend. R.* 340.) But a vendor, by articles, before making a deed, and while any part of the consideration remains due, is so far tenant of the freehold as to make him a proper party to the action of dower *unde nihil habet*. (*Jones v. Patterson*, 12 *Penn. R.* 149. *Shaver v. Boyd*, *Ib.* 215. *Referred to in 1 Hilliard's Real Prop.* 243, note a.)

A suit for dower in most of the states may be brought at the election of the widow. By the common law, when there was a custom in a manor that the widow should enjoy during her widowhood, the whole or part of the customary lands of which her husband died seised, as of freebench, she might, after challenging her right, and praying to be admitted, maintain ejectment, even against the land, because her right was regarded as an excrescence which, by the custom and the law, grew out of the estate. But when the widow's claim is in the nature of dower, an ejectment at common law will not lie before assignment, but she must levy a plaint in the nature of a writ of dower in the proper court. (*Jordan v. Stone*, *Hutton's R.* 18. *Howard v. Bartlett*, *Hobart's R.* 181. *Doe v. Nutt*, 5 *Bos. & Pull. R.* 430. *Chapman v. Sharp*, 2 *Show. R.* 184.)

But by the statutes of several of the states, the common law remedy of the widow for her dower has been abolished, and instead she may bring her action of ejectment. For instance, in the State of New York, the statute provides that the widow entitled to dower, after the expiration of six months from the time her right accrued, may recover her dower, of any lands, tenements or hereditaments, by action of ejectment. (2 *R. S. part 3, chapter 5, tit. 1, § 1, sub. 2.* 2 *Stat. at Large*, 312.) Under this provision of the statute, it is held that the action must be brought against the *actual occupant* of the land of which she is dowable, and not as in the former action of dower against the tenant of the freehold. (*Ellicott v. Moshier*, 7 *N. Y. R.* 201. *S. C.* 11 *Barb. R.* 574. *Sherwood v. Vandenburg*, 2 *Hill's R.* 303.) If the action is brought before dower has been admeasured, and the widow recovers judgment, she then proceeds to have her dower assigned; and for that purpose she files the record of judgment, whereupon the court appoints three reputable and disinterested freeholders, commissioners to make admeasurement of the dower out of the lands described in the record, and the commissioners so appointed are required, as speedily as may be, to admeasure and set off the one-third part of the said lands to the widow as her dower. (2 *R. S.*

part 3, ch. 5, tit. 1, § 55. 2 Stat. at Large, 321.) It has been held that these provisions of the statute substituting the action of ejectment to recover dower in lieu of the writ of dower affect only the *forms* or *mode of proceeding* in prosecuting the suit, and do not alter or modify the *right* or interest of the widow in the land. (*Yates v. Paddock*, 10 Wend. R. 529.)

§ 423. In England a widow cannot recover her dower without a previous demand for it; and, in general, a previous demand is necessary to maintain an action for it in the United States. In New York the action of ejectment may be brought before demand of dower, but in that case the widow does not recover costs, provided the action is brought for dower in real property aliened by the husband. (*Code of Procedure*, § 307.)

When a demand is held to be necessary, it may be made by parol, and by the widow in person or by her attorney or agent. The demand should be made of the tenant of the freehold at the time it is made, and it should describe with reasonable certainty the land in which the dower is claimed. (*Vide Baker v. Baker*, 1 Greenl. R. 67. *Leavitt v. Lamprey*, 13 Pick. R. 382. *Page v. Page*, 6 Cush. R. 196. *Pinkham v. Gear*, 3 N. H. R. 163. *Haynes v. Powers*, 2 Foster's R. 590. *Watson v. Watson*, 1 Eng. L. and Eq. R. 371.) The demand is held to be sufficient if it apprise the tenant with reasonable certainty with respect to the claim. (*Davis v. Walker*, 42 N. H. R. 482.) And the description will be deemed sufficient if it give notice to the tenant to what land the demand refers. (*Atwood v. Atwood*, 22 Pick. R. 283.) But a demand for dower made by an attorney in fact, in virtue of a power authorizing him, for the constituent and in her name and behalf, to demand her just dower to be assigned to her "in any and all of the beforementioned premises, or any other," no premises whatever being mentioned in the instrument, was held by the supreme judicial court of Massachusetts to be insufficient, although such authority is subsequently ratified by the constituent by a second power of attorney, in which she recites the former, and authorizes the same attorney to commute for and settle all her claims of dower in the premises, no premises being otherwise mentioned in such power of attorney than by reference to the former power. (*Sloan v. Whitman*, 5 Cush. R. 532.) The same court held in another case that the demand of dower need not be made in writing. (*Page v. Page*, 6 Cush. R. 196.)

Under the Revised Statutes of Massachusetts, a woman, before commencing her action for dower, must make personal demand of the tenant of the freehold, if within the commonwealth, and when there is more than one person seised of the freehold a personal demand must be made on each of them. A written demand upon all, served by handing a copy to one personally, and leaving copies at the dwellings of the others, was held insufficient. (*Burbank v. Day*, 12 Metc. R. 557. But vide Gen. Stat. 1860, ch. 135, § 3.)

When a demand is alleged in the writ, and is not denied in the pleadings, it is not necessary for the demandant to prove it. (*Ayer v. Spring*, 10 Mass. R. 80.)

In New Hampshire it has been held that the statute of limitations begins to run from the time the widow's right accrues to a writ of dower after a demand, and not when she became entitled to her dower upon the death of her husband. (*Robin v. Flanders*, 33 N. H. R. 524.)

§ 424. But the common law remedy for the recovery of dower by action, has been generally superseded by a convenient and summary mode of assignment of dower, by commissioners appointed by courts of probate and other competent tribunals, under special statutory enactments. Thus, in the State of New York, it is provided by statute, that any widow whose dower has not been assigned within forty days after the decease of her husband, may apply, by petition, for the admeasurement of her dower, to the supreme court, or to the county court of the county in which the lands subject to dower lie; or to the surrogate of the same county, specifying the lands to which she claims dower. Notice of the time and place of presenting the petition has to be served on the proper parties, all of which is prescribed by the statute, and if the widow do not make her demand of dower, by commencing a suit, or by an application for admeasurement as prescribed, the heirs, or any of them, or the owners of the land subject to dower, claiming a freehold estate therein, may make a similar application to a similar court for such admeasurement of the widow's dower. Upon the application being made as prescribed, the court may, upon hearing the parties, order that admeasurement be made of such widow's dower of all the lands of her husband, or of such part thereof as may be specified in the application; and thereupon appoint three reputable and disinterested freeholders commissioners for the purpose of making the admeasurement. These com-

missioners are required to go on and admeasure and lay off the widow's dower according to certain rules prescribed, and make a report of their proceedings to the court, and on the report being confirmed, the widow may bring and maintain an action of ejectment to recover the possession of the lands admeasured to her for her dower, and, upon recovery, she may hold the same during her natural life. The practice and manner of proceeding are fully prescribed by statute. (2 *R. S. part 3, ch. 8, tit. 7, §§ 1-27.* 2 *Stat. at Large*, 510-515.) Under this statute it has been held, that, in proceedings before a surrogate by a widow, to obtain admeasurement of dower, it is necessary to give notice of the proceedings only to the tenant of the freehold; tenants for years are not entitled to notice. (*Ward v. Kitts*, 12 *Wend. R.* 137.) And again, that on a proceeding before a surrogate for the appointment of admeasurers of dower, an inquiry whether a settlement has been made by the husband in lieu of dower, cannot be gone into; if there be a defense to the widow's claim of dower it must be set up when she brings her action for the recovery of the part assigned to her. (*Hyde v. Hyde*, 4 *Wend. R.* 630.) If one of the admeasurers dies before the execution of his trust, the vacancy may be supplied by a new appointment made by the surrogate for the time being, although the original appointment was made by his predecessor. (*Gale v. Edsall*, 8 *Wend. R.* 460. And *vide White v. Story*, 2 *Hill's R.* 543.) And when, in proceedings before the surrogate for the admeasurement of dower, due notice of the application was given to the tenant, who did not attend before the surrogate, and the latter appointed three commissioners according to the statute, but on ascertaining that one of them could not serve by reason of ill-health, substituted another in his place; it appearing from the surrogate's return that both the first appointment and the substitution took place on the day for which the application was noticed; it was held that the whole might be regarded as one continuous act, and the substitution therefore regular without any additional notice. (*White v. Story*, 2 *Hill's R.* 543.)

Similar provisions are made by statute for the admeasurement of dower, in most or all of the states; in some by the court of probate, in some by the orphan's court, and in some by commissioners appointed by the county court, and the practice is regulated by statute or rule of court.

In the State of Virginia, an assignment of dower made by commissioners under an order of court, at the instance of one of several co-heirs, is held to be binding on the widow, provided it be a just and full assignment, and it is binding on the co-heirs even if they are infants. (*Moore v. Waller*, 2 *Rand. R.* 418.)

When an assignment of dower was made by the commissioners duly appointed, but the court never confirmed or acted upon their report, although the doweress took possession of the land assigned, and the heir acquiesced and took a lease of the land, it was held by the court that the assignment was good and effectual. (*Hickman v. Irving*, 3 *Dana's R.* 124.)

In the State of Massachusetts, it is not necessary that the commissioners appointed by the judge of probate to assign dower should be freeholders of the county where the husband last dwelt. (*Miller v. Miller*, 12 *Mass. R.* 454. *And vide Gen. Stat. ch. 90, § 3.*) The judge of probate in Massachusetts has no authority under the statute to assign dower in mortgaged lands in opposition to the mortgagee. (*Raynham v. Wilmarth*, 13 *Metc. R.* 414.) Nor in lands whereof the husband did not die seised. (*Sheafe v. O'Neil*, 9 *Mass. R.* 9.) But the widow of a mortgagor of real estate, who has released her dower therein, is nevertheless entitled to have dower assigned to her in the mortgaged premises, the mortgage debt still subsisting, upon a petition to the court of probate therefor, under the statute, provided the mortgagor died seised, and neither the mortgagee nor the heirs or devisees of the mortgagor object to such assignment. (*Henry's case*, 4 *Cush R.* 257.)

In the State of Michigan, notice to the administrator of proceedings in the probate court for the assignment of the widow's dower under the statute, is not necessary. (*Matter of Campbell*, 2 *Doug. R.* 141.)

In Kentucky, the jurisdiction of county courts in allotting dower is special, and their records must show every fact required by statute; and an allotment of dower by such courts is a proceeding *in rem*, operating as general notice, and no other notice is necessary. The allotment merely fixes the bounds of the land allotted. (*Stevens v. Stevens*, 3 *Dana's R.* 371.) The county court has no right to appoint commissioners to assign dower, except in cases where the husband died seised of the land; in cases where the husband alienated lands before his death, the circuit court has jurisdiction. (*Rwitch v. Cunningham*, 4 *Bibb's R.* 462.) And

dower can only be assigned by the county court upon the application of the widow or heirs, or some one having a legal interest in the land. (*Shield v. Batts*, 5 *J. J. Marsh. R.* 13.) And the order of such court, appointing commissioners to assign dower, ought to show on whose application it was made. (*Smith v. Maxwell*, 3 *Litt. R.* 471.) The appointment of commissioners, however, is *prima facie* evidence of a lawful application; and a statement in the commissioners' report that they were duly sworn before proceeding to execute them, is sufficient evidence of the fact. (*Williams v. Morgan*, 1 *Litt. R.* 167.) But when an order appointing commissioners to assign dower has been set aside, and new commissioners appointed, any report afterward made by the former is void, and cannot be rendered valid by any order of the court. (*Smith v. Maxwell*, *supra*.)

It may be affirmed generally that when dower is assignable by commissioners under these summary proceedings, the husband must have died seised of the lands from which the dower is claimed, or, at least, the right must not be disputed by the heirs. The widow's only remedy in case of dispute with respect to her right is by a suit. (*Sheafe v. O'Neil*, 9 *Mass. R.* 9. *French v. Crosby*, 23 *Maine R.* 276. *Hollomon v. Hollomon*, 5 *Smedes & Marsh. R.* 559. *Stiver v. Cawthorn*, 4 *Dev. & Batt. R.* 501.)

§ 425. The statutory provisions for the summary admeasurement of dower do not in general vary the right to dower, or supersede the old remedy, but they are designed to institute a more easy and certain mode of obtaining the widow's dower. This method of proceeding for the assignment of dower is not always uniform in respect to the nature of the proceeding in the different states. Usually the proceeding is called a petition, but in some states it is called a complaint, although it is in fact everywhere, in its nature, summary. Thus, in Vermont the proceeding is called a complaint; and in the State of New York the widow may proceed by petition for the admeasurement of dower, or she may proceed by complaint, and the complaint may be regarded under the code either as in place of the petition or as a bill in equity, and not as an act of ejectment. (*Townsend v. Townsend*, 2 *Sand. R.* 711.) The proceeding is founded on the assumption that the widow is entitled to her dower out of the estate in question, and that it is only to be designated and set off. There is generally no provision for trying the title to dower in this proceeding, and the admeasurement which

is made does not affect or prejudice the right to dower, or the legal or equitable bar to it. Those rights, if litigated, remain open for investigation in the ordinary course of justice. The admeasurers are not to do execution as the sheriff does when the dower is assigned in an action, on a writ of *habere facias possessionem*. If the right to dower be denied, the party may protect his possession notwithstanding the admeasurement, and drive the widow to her action at law. (*Matter of Watkins*, 9 *Johns. R.* 246. *Jackson v. Randall*, 5 *Cow. R.* 168, 169.) The chief object of the proceedings is to ascertain the extent of the widow's dower, and save difficulty and contention between her and the heir or tenant. (*Williams v. Morgan*, 1 *Litt. R.* 167.) And the record of the assignment of dower, in the absence of positive proof, is presumptive evidence that the assignment was made upon the petition of the widow and with her assent, as the proceeding is for her benefit. So held in Massachusetts. (*Tilson v. Thomson*, 10 *Pick. R.* 359.)

In Alabama it is held that the statutory method of assigning dower is merely cumulative, and does not at all affect the jurisdiction of the common law courts on the subject. (*Johnson v. Neil*, 4 *Ala. R.* 166.) And in Pennsylvania the common law courts have concurrent jurisdiction with the probate court in the matter of the admeasurement of dower; and in some cases the probate court has no jurisdiction. (*Brown v. Adams*, 2 *Whart. R.* 188. *Evans v. Evans*, 9 *Barr's R.* 190. *But vide Bratton v. Mitchell*, 7 *Watts' R.* 113. *Rittenhouse v. Levering*, 6 *Watts & Serg. R.* 190.) In the State of Missouri the proceeding is in the form of a petition, and the assignment is made by commissioners; but a writ of possession issues, and the proceeding does not supersede the "writ of dower." The practice is similar in New Jersey.

In South Carolina the petition is to a common law court, which issues a writ for admeasurement to commissioners, and the commissioners are required to put the widow in full possession of the lands set off to her; and the practice is substantially the same in Delaware.

The admeasurement of dower is ordinarily founded upon the application of the widow, though in some states it may be done on the petition of the heirs, and in others upon the application of the heir or other party interested.

In some of the states the statute of limitations constitutes no bar to the widow's claim of dower, and in others it does. But a

statute of limitation in common form is held inapplicable to dower, for the reason that the wife has no seisin.* (*Jones v. Powell*, 6 *Johns. Ch. R.* 194.)

§ 426. As has been before intimated, where dower is summarily admeasured, the proceedings are not usually the foundation of a judgment, upon which a writ of possession issues; but the widow still has to institute a suit to obtain possession of the land set off to her, unless it is amicably conceded to her. But when the widow resorts to the common law courts to recover her dower, on recovery, the sheriff makes the assignment, and under the writ of seisin delivers to the demandant possession of her dower by metes and bounds, if the subjects be properly divisible and the lands be held in severalty. (*Co. Litt.* 34. 4 *Kent's Com.* 63.) If the sheriff makes an improper assignment of dower, it will be set aside by the court, and in some cases he will be punished. Thus, when the sheriff returned that he had assigned to the widow for her dower of a house, the third part of each chamber, and had chalked it out for her, the court held this an idle and malicious assignment, and the sheriff was committed for it, as he ought to have assigned to her certain chambers or rooms. (*Howard v. Cavendish*, *Palm. R.* 264. 1 *Greenl. Cruise*, 171. *Vide also Longvill's case*, 1 *Keb. R.* 743.) And in one case, where the heir sought relief against an assignment of dower by the sheriff, on the ground that a third part of the land was assigned without taking notice of a coal work that was on the estate, offering the widow one entire third, both of the land and coal work, by way of rent-charge on the whole, the court ordered that she accept the offer, or that otherwise a new assignment of dower should be made. (*Hobby v. Hobby*, 1 *Vernon's R.* 218.)

If the widow be entitled to dower out of manors and lands, the sheriff must assign to her one-third part of each, by metes and bounds. (*Litt.* § 36.) The reason is, that it is more eligible and convenient for the widow and tenant of the lands to enjoy their shares in severalty than in common. But if the writ directed to the sheriff command him to deliver possession of a third part of all lands and tenements, and there were lands in meadow, pasture and corn, he would act in obedience to the writ by assigning dower

* For a full and elaborate discussion of the different matters hinted at in this section, the student is referred to 1 *Hilliard on Real Property*, 150-153, where the authorities are also appropriately cited.

in toto out of those descriptions of lands, and his return to the court of having done so would be approved. (*Moore*, 19 *pl.* 66.)

The sheriff is a mere ministerial officer, and can only assign dower according to the rule of the common law and the tenor of the writ addressed to him by the court. If, therefore, the subject out of which dower is to be assigned be divisible into shares, and he does not return that he has delivered seisin of a third part of it by metes and bounds, the assignment cannot be supported. But it is not necessary for him to state in his return to the court the particular fields which he has allotted for the widow's third; it will be sufficient if he mention with certainty and precision of what such third consists. (*Howard v. Cavendish*, *Palm. R.* 264. *Vide also Den v. Abingdon*, *Doug. R.* 456. *Fenny v. Durrant*, 1 *Barn. & Ald. R.* 40.)

When the property does not admit of an assignment of dower in severalty, either from the nature of the husband's interest in it or from the quality of the thing itself, an assignment by metes and bounds will by necessity be dispensed with. An instance of this kind occurs in the case of a tenancy in common, and another in the case of coparceners. (*Fitzherbert's Natura Brevium*, 149. *Perk.* § 412.)

§ 427. But it is necessary to refer to the principles and rules with respect to the admeasurement of dower as settled by the authorities in the United States. Generally speaking they are the same as those which have prevailed in England; but in some instances they have been considerably modified. Though dower must, in general, be assigned by metes and bounds, yet there are exceptions to this rule; for example, where the subject-matter is of such a nature that no division can be made which will give the parties the enjoyment of their respective shares in severalty, in which case it may be so assigned as to give the widow one-third of the profits, or the parties may have an alternate occupation of the entire property. In the case of incorporeal hereditaments, the dower must be assigned in a special manner, having respect to the nature of the subject and the mode of enjoyment. This is quite reasonable, and there is nothing new in the rule. It is as old as Littleton and Coke, but it has been frequently referred to and explained in this country. Where part of a dwelling-house is assigned to the widow for her dower, it must often be necessary to allow her the use of some of the halls and passages in common with the heir or tenant,

as the only mode in which she can have the beneficial enjoyment of her part of the property. Sometimes the claim of dower is in a mill, a division of which is impracticable. Then, the widow must be endowed in a special manner, as by having every third toll-dish, or the entire mill every third year or month, or by taking a share of the profits in some other form. And in mines which have been opened in the life-time of the husband, if dower cannot be assigned by metes and bounds, the parties may have an alternate occupancy of the whole, or the widow may take a third of the rents and profits. (*Coates v. Cheever*, 1 Cow. R. 460. And vide *Stoughton v. Leigh*, 1 Taunt. R. 402.) There are cases where the thing is of such a quality that no division can be made which will give the parties the enjoyment of their respective shares in severalty.

Where the premises in which dower was claimed consisted of a village lot with a dwelling-house thereon, and the commissioners, among other things, assigned to the widow particular rooms in the house, with the right of using the stairways, halls and other passages, so as to afford ingress and egress for the enjoyment of the rooms, the court held that it was not an assignment to which the tenant could legally object; although it is a question, perhaps, whether the widow might not properly object to having "a chamber within the house of another man," but there is nothing found in the book to relieve the man from the "trouble and vexation" which may follow. (*White v. Story*, 2 Hill's R. 543.) This does not conflict with the authority of *Howard v. Cavendish*, *Palmer's R.* 246, where the sheriff assigned to the widow a *third part* of each chamber, and *chalked out* her part, and the court held it an idle and malicious assignment and committed the sheriff to prison. On the contrary, the New York supreme court recognized the case as authority, but remarked that it decided nothing against the principle of assigning to the widow *the whole* of particular rooms in the house. (*White v. Story*, *supra*, 549.) The premises being a single lot and building, the widow consenting, particular rooms, with the use of the halls and passages so as to give ingress and egress, may be set apart as dower. (*Parks v. Hardey*, 4 Brad. R. 15.)

In South Carolina, an assignment of an entire tract, in lieu of one-third of each separate tract, may be set aside. (*Scott v. Scott*, 1 Bay's R. 504.) But in Delaware dower may be assigned in one

tract for the whole, according to the English rule, the court holding that in general this is the mode of assignment in cases of intestacy, and against the heir; but that as against devisees or purchasers from the husband, dower is to be assigned, if practicable, in the separate parcels. (*Coulter v. Holland*, 2 *Harr. R.* 330.)

In North Carolina, it is provided by statute that the assignment need not embrace one-third of each tract; but the jury may allot the same in one body or several, or one or more tracts. (*Rev. Code* 1855, *ch.* 118, § 3.) And in Massachusetts, in the assignment of dower, the commissioners are to regard the annual income of the estate out of which dower is to be assigned, and set off to the widow so much as will yield her one-third of such income, in parcels best calculated to the convenience of herself and heirs. (*Leonard v. Leonard*, 4 *Mass. R.* 533. *Miller v. Miller*, 12 *ib.* 455. *Conner v. Shepherd*, 15 *ib.* 164. And *vide Jones v. Bremer*, 1 *Pick. R.* 314. *Gen. Stat. ch.* 90, § 5.)

In 1796, in the State of Massachusetts, a widow was allowed dower in $\frac{1}{16} \frac{5}{4} \frac{5}{4}$ parts of the great sheep pasture in Nantucket. (*Coffin v. Coffin*, 4 *Dane's Abr.* 674.)

In New Jersey it is held that a widow is not bound to claim or take dower entire out of the whole plantation in possession of the husband's heirs, but may recover it in parcels of the several tenants in possession. (*Sip v. Lanbuck*, 2 *Harr. R.* 442.) The general rule is, that dower is to be assigned in separate parcels, and by metes and bounds, if practicable; but if impracticable, then it may be assigned out of the rents and profits, or the parties may occupy the whole alternately. (*Matter of Chase*, 1 *Bland's R.* 206. *Stevens v. Stevens*, 3 *Dana's R.* 373. *Hyzer v. Stoker*, 3 *B. Mon. R.* 117. And *vide Pierce v. Williams*, 2 *Penn. R.* 709.) And in Vermont, Maine, New Hampshire, Rhode Island, and perhaps some other states, it is expressly provided by statute that the widow shall take one-third of the rents and profits, if no division is practicable. In Kentucky the widow may elect to have the property every third year, or one-third of the rents, issues and profits. In Illinois and Missouri, when the commissioners for assigning dower report that a division will be injurious, the widow is to have the yearly value in lieu of dower, to be assessed by a jury. In Georgia, if the property is situate within a city, or village, or public place of business, the commissioners are to assign the dower according to quantity or valuation, at their discretion. (*Vide* 1 *Hilliard's*

Real Prop. 135.) In Alabama, dower is not admeasured under the statute unless it can be designated by metes and bounds. If the admeasurement cannot be made in that way, compensation must be made in money. (*Barney v. Frownar*, 9 *Ala. R.* 901. *But vide Adams v. Barrow*, 13 *ib.* 205.) And when compensation is made in money in lieu of dower, it must be by way of an annual payment corresponding with the annual value of the dower interest during the life of the doweress, and the payment should be secured by a mortgage on the estate. (*Beams v. Smith*, 11 *Ala. R.* 20.) The rule in this regard is substantially the same in South Carolina. (*Hayward v. Cuthbert*, 3 *Brevard's R.* 482. *Lesesue v. Russell*, 1 *Bay's R.* 459.)

When the widow agrees to take a sum of money in lieu of her dower, the amount agreed upon must be paid, or the widow may recover her dower. (*Sargeant v. Roberts*, 34 *Maine R.* 135.)

§ 428. It is well settled that the right to have the assignment of dower by metes and bounds may be waived by the widow, and in such cases an assignment to hold her dower in common and not in severalty will be binding upon her. If the widow be dowable of several manors, lands, tenements and commons, she may accept an assignment for life of any one or more of them in lieu of her dower in all the rest; and such assignment confirmed by entry will bind her, although it may be less than the value of her third part of each. (*Rowe v. Power*, 5 *Bos. & Pull. R.* 1, 33. *Cootes v. Lambert*, 9 *Vin. Abr.* 256.) But mere consent to accept dower contrary to the common right will not be sufficient to bind the widow. (1 *Roper's Husband and Wife*, 400.)

Where rent was granted by the tenant in tail out of the estate to the widow, who was entitled to dower out of the lands, in lieu of her dower, which she accepted, it was determined to be a good assignment, to the extent at least of excluding her right to endowment while the rent continued and was not determined by the issue in tail. (*Bickley v. Bickley*, *Anderson's R.* 287.) And if the widow recover judgment for her dower out of certain lands, and before execution she accepts from the tenant an assignment of a rent out of them, this assignment will be a good answer by the tenant to a *scire-facias* brought by her to obtain execution upon the judgment, because the assignment is a compliance with and satisfaction of the judgment. (*Vide Hanger v. Fry*, *Cro. Eliz.* 310. *But vide Sargeant v. Roberts*, 34 *Maine R.* 135.)

Upon this subject Mr. Roper remarks: "It is observable that it was the widow's consent, entry and acceptance which in the above instances gave validity to the particular assignment of dower against common right. But her consent will not avail to establish them when, from the nature of the transaction, she cannot have the like estate or interest in the subject assigned in lieu of dower as she would have had if her dower had been assigned in the regular way, viz., during her life. It may therefore be considered as settled at law, that an assignment, with the consent and acceptance of the widow, of something, in lieu of dower, to which she is entitled of common right, must either be of some part of the lands of which she is dowable, or of a rent issuing out of them, and for such an interest as may endure for life; and that if any of these particulars be wanting, the assignment will be void." (1 *Roper's Husband and Wife*, 401, citing *Co. Litt.* 34 b.)

It was at a very early day expressly decided that if, after the death of the husband, the heir makes an estate to the wife for life of any land whereof she is dowable, in full satisfaction of her dower, that is no bar of dower. This was on the supposition that the estate given in lieu of dower was effectually conveyed to her, and it proceeded on the principle that a right to an estate of freehold could not be barred by acceptance of any collateral recompense. (*Vernon's case*, 4 *Coke's R.* 1. *Turney v. Sturges*, *Dyer's R.* 91.)

§ 429. The assignment of dower must be for the widow's life, whether it be of common right or of a compensation in lieu of dower. Besides, the assignment must be absolute, and not subject to be defeated by any condition, nor lessened by any exception or reservation. (*Co. Litt.* 34.) It has been held, however, at law, that where dower is assigned upon condition, the assignment would be good, but the condition void. Thus, if dower were assigned of the land with the exception of the trees growing upon it, the exception would be void. (*Bullock v. Finch*, 1 *Roll. Abr.* 682.) In equity, however, under the doctrine of election, the widow would be considered to be excluded from her dower in those instances, if she accepted the compensation in lieu of it, or the assignment made upon conditions. (*Birmingham v. Kirwan*, 2 *Sch. & Lefroy's R.* 444.) Should the sheriff, heir, or tenant assign more to the widow than a third part of the subject in which she is entitled to dower, the remedies vary according to the persons by

whom it was assigned. If it be assigned by the sheriff, his mistake in assigning more than one-third for dower will be corrected upon *scire-facias* for an assignment *de novo* by the heir or tenant. (*Howard v. Cavendish*, *Palmer's R.* 266. 1 *Bright's Husband and Wife*, 380.) And if the assignment be of lands not comprised in the judgment, they may be recovered back by an ejectment; for whatever is included in the sheriff's return, and not authorized by the judgment, to that extent the execution is void. (*Brock v. Lindsey*, 2 *Ld. Raym. R.* 1293-1295.) If the widow should be lawfully evicted of her dower which has been assigned to her, she will be entitled to be endowed anew; and then she will receive the full third part of all the real estate of her deceased husband of which she is by law dowable. (*Scott v. Hancock*, 13 *Mass. R.* 162, 168. *Vide also St. Clair v. Williams*, 7 *Ohio R.* 447. *Singleton v. Singleton*, 5 *Dana's R.* 87. *Pierson v. Williams*, 23 *Miss. R.* 64. *Willet v. Beatty*, 12 *B. Mon. R.* 172.)

Equity has given relief against a partial or improper return by the sheriff. (*Hoby v. Hoby*, 1 *Vern. R.* 218. *Sneyd v. Sneyd*, 1 *Atk. R.* 442.) This case, however, was decided many years ago, and it is doubtful whether courts of equity would at the present day entertain jurisdiction if it appeared that the party aggrieved might have adequate redress in the court of law under whose authority the sheriff acted. And in a case decided in the English court of chancery, in 1822, the master of the rolls expressed the opinion that there was no jurisdiction in equity to set aside a sale by a sheriff under an execution, but that the proper course was to apply to the court of law from whence the process issued. (*Stratford v. Twynam*, cited in 1 *Bright's Husband and Wife*, 381.)

When the assignment of dower is made by commissioners under the statute, the commissioners have the same powers as a sheriff under an execution upon a judgment in dower; and if they make any mistake in the method of making the admeasurement, or of the quantity assigned to the widow for her dower, the proper correction will be ordered by the court on the coming in of their report. (*Coates v. Cheever*, 1 *Cow. R.* 460. *Matter of Shaw*, *Id.* 176. *Hawkins v. Hall*, 2 *Bay's R.* 449.) When, on application to the surrogate, dower has been duly admeasured and assigned, pursuant to the statute, and there has been no appeal or review of the proceedings, the admeasurement, until reversed, is conclusive in an action of ejectment brought by the widow, as to the part

which she is entitled to recover. (*Jackson v. Nixon*, 17 *Johns. R.* 123.) But, as has been before intimated, although the admeasurement of dower is conclusive, as to the part to which she is entitled, if entitled at all, it is no evidence in New York, of her title, and she must make proof of it as in other cases. (*Jackson v. Randall*, 5 *Cow. R.* 168. *Jackson v. De Witt*, 6 *ib.* 316. *Jackson v. Churchill*, 7 *ib.* 287. *Parks v. Hardey*, 4 *Brad. R.* 15.)

§ 430. When the assignment is made, not by the sheriff, or commissioners appointed under the statute, but by the heir, then if he be of full age, and were under no disability when he made the assignment, although the assignment exceeded the widow's one-third part of the value of the estate, a court of law would not relieve him against it. (*Stoughton v. Leigh*, 1 *Taunt. R.* 404, 412.) But if the heir were under age when he assigned dower, the law protects him against the consequences of an excessive assignment, and supplies him with the writ of admeasurement of dower. (*Vide Eagles v. Eagles*, 2 *Hayw. R.* 181. *McCormick v. Taylor*, 2 *Cart. R.* 336.) This writ is addressed to the sheriff, directing him to make the admeasurement finally. It is not made returnable, and the parties may plead before him if they think proper. The books differ in regard to the time when the heir is entitled to issue the writ; whether before he is of full age or not; but reason and principle seem to be in favor of the rule that he is entitled to the writ during his nonage. (*Fitz. N. B.* 149. 1 *Bright's Husband and Wife*, 382. *But vide Co. Litt.* 39.)

An infant heir who has assigned too large a portion of lands for dower, cannot defeat the assignment by entry upon attaining twenty-one, because, the widow being entitled to dower, the assignment is good in part and can only be avoided *quoad* the excess, which is uncertain previous to admeasurement. (*Gilb. Dower*, 388. *And vide* 1 *Rop. Husband and Wife*, 409. *McCormick v. Taylor, supra.*) According to Mr. Gilbert, if the sheriff, in carrying into effect the writ of execution, did actually assign more than a third part of the lands for dower, when the widow was entitled to a third only, the heir might bring a *scire-facias*, or he would be without a remedy. (*Gilb. Dower*, 389.) If the lands assigned by the infant heir exceed one-third of the whole, and they become more valuable than the remainder by improvements made by the widow, it is said that a writ of admeasurement will not lie on account of such improvements, as that would be unjust, since she may have

been induced to make them under a presumption that the assignment was proper. But there seems to be no objection to the admeasurement of the lands assigned, and to their taking the overplus, upon allowing for the value of the improvements of the excess of the lands assigned. (*Fitz. N. B.* 149. 1 *Bright's Husband and Wife*, 383.)

§ 431. When the heir, on the acceptance of the widow, assigns one tract in lieu of a third part of each of several tracts of the deceased husband's land, this is called an assignment against common right; and it is a principle in such cases that the widow takes subject to all incumbrances by the husband. If the estate turns out to be more valuable than a third, she may still hold it; and on the contrary, if it proves less valuable, she must bear the loss. The important point in every case of that kind is, that the widow has accepted what could not have been lawfully assigned to her against her will. It is a voluntary release of a legal right for something supposed to be equivalent or more. The release must stand, though the consideration fail. This is upon the principle that it would be highly injurious to the public if an innocent purchaser should not be protected in such a case. He is not bound to look beyond the deed of release. (*Jones v. Brewer*, 1 *Pick. R.* 317, 318. *Vide also French v. Pratt*, 27 *Maine R.* 381. *Sargeant v. Roberts*, 34 *ib.* 135.)

When the tenant assigned to the widow twenty bushels of wheat every year, for her life, out of lands in which she was entitled to dower, that being in the nature of rent, and *accepted by her*, it was held to be a good assignment of dower. An assignment of rent for dower is said to be against common right, and it is therefore the consent and acceptance of the widow which give validity to the assignment; and her consent will not avail when, from the nature of the transaction, she cannot have the life estate or interest in the subject assigned in lieu of dower, as she would have had if her dower had been assigned in the usual way during her life. (*Ellicott v. Mosier*, 11 *Barb. R.* 574, 579.) And we have seen that, except in case of endowment *against common right*, when the widow is evicted from the lands assigned to her as dower, by a title paramount to that of her husband, she is entitled to be endowed anew of a third of the remaining lands. (*Ante*, § 429. *Hollomen v. Hollomen*, 5 *Smedes & Marsh. R.* 559. *Bustard's case*, 4 *Coke's R.* 122.)

§ 432. By virtue of the ancient statute of Merton, 20 *Hen. III.*, *ch.* 1, which has been expressly or impliedly adopted in most of the United States, the widow is entitled to recover damages from the death of her husband, as well as her share of the land, provided her husband died seised; but as against an alienee, only from the time that dower is demanded. (1 *Hilliard's Real Prop.* 144. 4 *Kent's Com.* 65. *Jackson v. O'Donaghy*, 7 *Johns. R.* 247.) But damages can only be recovered in writs of dower *unde nihil habet*, and do not extend to the writ of right of dower, because damages can only be given for the detention of the possession; and in writs of right, when the right itself is doubtful, no damages are given, because no wrong is done till the right is determined. And generally, damages are only due from the time when the claim of dower has been made, for the heir on whom the law casts the freehold is not bound to assign dower until it is demanded. But this rule is modified by the statutes of some of the states. At common law, no damages were recoverable in dower, and consequently they depend entirely upon the provisions of the statute. (*Embler v. Ellis*, 2 *Johns. R.* 119.)

In the State of New York the widow is entitled to damages from the death of the husband provided he died seised. She can recover them only against the tenant, and he is liable for them for the whole time, though he has not himself been half the time in possession. (*Hitchcock v. Harrington*, 6 *Johns. R.* 290.) The damages by statute are one-third part of the annual value of the mesne profits of the lands in which she recovers dower, to be estimated in a suit against the heirs of her husband from the time of his death; and in suits against other persons, from the time of her demanding her dower of such persons; and in all cases to be estimated to the time of recovering judgment for such damages, but not to exceed six years in the whole in any case. But the damages are not to be estimated for the use of any permanent improvements made after the death of her husband by his heirs, or by any other person claiming title to such lands. And when the widow recovers her dower in any lands claimed by the heir of her husband, she is entitled to recover of such heir, in an action on the case, her damages for withholding such dower from the time of the death of her husband to the time of such alienation by the heir, not exceeding six years in the whole; and the amount recovered from such heir must be deducted from the amount she would otherwise be

entitled to recover from such grantee; and also any amount recovered as damages from such grantee, must be deducted from the sum she would otherwise be entitled to recover from such heir. (1 *R. S. part 2, ch. 1, tit. 3, §§ 20, 21, 22.* 1 *Stat. at Large*, 694.)

When there are several heirs and terre-tenants, the amount of the widow's damages, to which she is entitled for the use of the undivided third of the premises of which the husband died seised, from the death of her husband, exclusive of the improvements since made thereon, must be assessed upon such heirs and terre-tenants respectively, according to the time of their enjoyment of the premises. (*Hazen v. Thurber*, 4 *Johns. Ch. R.* 604.)

The widow is not entitled to recover against the purchaser any arrears which accrued previous to his purchase of the premises. These arrears are to be ascertained, when there is an outstanding mortgage, by deducting one-third of the interest on the amount due thereon at the time of the purchase from one-third of the rents and profits of the property, over and above necessary repairs, taxes and other proper charges thereon. (*Russell v. Austin*, 1 *Paige's Ch. R.* 192.) But if the husband died seised the widow may recover in equity her share of the rents and profits from the death of her husband, although no demand was made by her before suit; and on her death pending the suit, her executors may revive, although equity cannot give her such arrears in a direct proceeding for their recovery, when the husband aliened the premises before his death. (*Johnson v. Thomas*, 2 *Paige's Ch. R.* 377.)

§ 433. In the State of Massachusetts, damages are recoverable in cases of dower, from the time of demand made on him who was the tenant of the freehold at the time of the demand. (*Gen. Stat.* 1860, *ch.* 135, § 5. *Leavitt v. Lamprey*, 13 *Pick. R.* 382.) And damages are measured in actions of dower by the annual value of the land, and may be assessed by the court, with the demandant's assent. (*Perry v. Goodwin*, 6 *Mass. R.* 499.)

In an action for dower, where the only issues are upon the demandant's marriage and on her husband's seisin, the tenant cannot avail himself of any improvements by him made since the husband's alienation. (*Ayer v. Spring*, 10 *Mass. R.* 80.) And when the tenant, a purchaser, pleaded to a writ of dower that he could not deny the demandant's right, but that he made improvements on the land, and had assigned to the demandant what was equal to a full third part of the premises as they were at the time

of the husband's alienation thereof, upon demurrer, it was held, that as a plea in bar, the plea was bad, and must be construed as admitting dower in the premises, without the improvements. (*Stearns v. Swift*, 8 *Pick. R.* 538.) If a demandant in a writ of dower dies after she recovers judgment for her dower, but before dower is set out to her, the action dies with her, and judgment for damages for the detention of dower cannot be rendered on motion of her administrator as of a former term. (*Atkins v. Yeomans*, 6 *Metc. R.* 438.) In the State of New Jersey, the rule with respect to damages is substantially the same as in New York; as against the *heir*, they are estimated from the husband's death. But it has been held in New Jersey, that "*tout temps prist*"—ready at all times—is a good plea for the heir or devisee of the husband, if he died seised, and he need not aver in his plea that he is heir or devisee. (*Hopper v. Hopper*, 1 *N. J. R.* 543.) But it is not a good plea for the husband's alienee, who is liable to damages from the husband's death. (*Woodruff v. Brown*, 4 *Harrison's R.* 246. *As per 1 Hilliard's Real Prop.* 144, note c.)

So also the rule is the same in the State of Delaware; and it has been held in Delaware, that interest may be recovered on arrears of an annuity given in lieu of dower, though there be a power of distress. (*Houston v. Jamison*, 4 *Harrington's R.* 330. *Layton v. Butler*, *Ib.* 507. *And vide 1 Hilliard's Real Prop.* 144, and note d.)

In the States of Maine, New Hampshire, Rhode Island and Maryland, damages are recovered after but not before the dower is demanded; and in Maine the widow is entitled to one-third of the *rents* till the dower is assigned. (1 *Hilliard's Real Prop.* 144, 145. *Steiger v. Hiller*, 6 *Gill & Johns. R.* 121.)

In Ohio and Alabama, no damages are allowed the widow on the admeasurement or recovery of her dower, but in Ohio the commissioners for assigning dower are required to appraise the yearly value of the land, from the date of the petition to that of the assignment, and one-third of the amount, deducting any improvements by a purchaser from the husband, is decreed to the widow. (*Laws of 1842*, 6. 1 *Hilliard's Real Prop.* 145, note b. *Bank v. Dunseth*, 10 *Ohio R.* 18.) And in South Carolina, *interest*, or *rents*, *issues* and *profits* are allowed when the husband died seised. (*Heyward v. Cuthbert*, 1 *McCord's R.* 386. *Wright v. Jennings*, 1 *Bailey's R.* 277. *Creary v. Cloud*, 2 *ib.* 343. *Richard*

v. *Talbin*, 1 *Rice's Eq. R.* 158. *Vide also Woodward v. Woodward*, 2 *Rich. Eq. R.* 23.)

In the State of Missouri, damages are recovered to the time of the trial; and in Alabama from the commencement of the action. In Virginia, the widow has an account of profits, as against a purchaser from the husband, only from the date of the subpoena. (1 *Hilliard's Real Prop.* 145. *McClanahan v. Porter*, 10 *Mo. R.* 746. *Rankin v. Oliphant*, 9 *ib.* 239. *Beavers v. Smith*, 11 *Ala. R.* 20. *Smith v. Smith*, 13 *ib.* 329. *Francis v. Garrard*, 18 *ib.* 794. *Tod v. Baylor*, 4 *Leigh's R.* 498.)

In Wisconsin the widow recovers one-third of the profits from the husband's death, from the heir, and from others only from demand. If the heir alienate the land, he is liable to damages from the husband's death to such alienation, not exceeding six years; and damages are not recoverable against both the heir and purchaser. (1 *Hilliard's Real Prop.* 145.) Similar provisions to those of the ancient statute of Merton are contained in the statutes of others of the American States. (*Vide Sharp v. Pettit*, 3 *Yeate's R.* 38. *Seaton v. Jamison*, 7 *Watts' R.* 5, 33. *Marshall v. Anderson*, 1 *B. Mon. R.* 198. *McElroy v. Walters*, 3 *ib.* 137. *Gauton v. Bates*, 4 *ib.* 367. *Davis v. Logan*, 9 *Dana's R.* 186. *Waters v. Gooch*, 6 *J. J. Marsh. R.* 590. *Tellman v. Bowen*, 8 *Gill & Johns. R.* 333. *Kiddall v. Trimble*, 1 *Md. Ch. Decis.* 143. *Goodburn v. Stevens*, *ib.* 420.)

§ 434. With respect to the principles upon which dower is admeasured, there is a similarity in the laws of the states, though there is not entire uniformity. Thus, in the State of New York, where the land has been aliened during the coverture, the widow's dower is to be taken according to the value of the land at the time of the alienation; that is to say, the assignment to the widow should be of one-third of the whole estimated value of the property, deducting the value of the improvements made since the alienation by the husband. (*Coates v. Cheever*, 1 *Cow. R.* 460. *Humphrey v. Plinney*, 2 *Johns. R.* 484. *Dorchester v. Coventry*, 11 *ib.* 510. *Shaw v. White*, 13 *ib.* 179. *Dolf v. Bassett*, 15 *ib.* 21. *Hale v. James*, 6 *Johns. Ch. R.* 258. *Walker v. Schuyler*, 10 *Wend. R.* 480.) Or, by the terms of the statute now in force, in making the admeasurement, the commissioners are required to take into view any permanent improvements made upon the lands from which the dower is to be assigned, by any heir, guardian of

minors, or other owners, since the death of the husband of the widow, or since the alienation thereof by such husband; and, if practicable, they are to award such improvements within that part of the lands not allotted to the widow, and if not practicable so to award the same, they must make a deduction from the lands allotted to such widow proportionate to the benefit she will derive from such part of the improvements as may be included in the portion assigned to her. (2 *R. S. part 3, ch. 8, tit. 7, § 13. 2 Stat. at Large, 512. Vide also Leonard v. Steele, 4 Barbour's R. 20, 23.*)

Admeasurers of dower, in ascertaining the part to be assigned to the widow, are not authorized to make any deduction in consequence of any conveyance of land or other gift made to the wife during coverture. (*Hyde v. Hyde, 4 Wend. R. 630.*)

In the State of Massachusetts the right to dower as against the husband's grantees is limited to the value of the premises at the time of the husband's last seisin, and does not include improvements made by the grantees and those claiming under them. (*Lebbey v. Scott, 4 Dane's Abr. 675. Ayer v. Spring, 9 Mass. R. 8. Catlin v. Ware, Ib. 218. Webb v. Townsend, 1 Pick. R. 21. Stearns v. Swift, 8 ib. 535. And vide White v. Willis, 7 ib. 143. White v. Cutler, 17 ib. 248.*) The reason given for the rule is, that the heir is not bound to warrant except according to the value as it was at the time of the alienation, and therefore the wife ought not to recover more against the alienee of the husband; and the rule is said to be supported in Massachusetts upon principles of public policy, that purchasers may not be discouraged from improving their lands. (*Gore v. Brazier, 3 Mass. R. 523, 544. Powell v. Monson, 3 Mason's R. 347, 365-370. Parker v. Parker, 17 Pick. R. 236.*) But when the heir of the husband makes improvements after the land descends to him the rule is otherwise, for it is said to be his folly not to assign the widow her dower before he makes the improvements. (*Catlin v. Ware, supra.*) And if the lands have greatly increased in value, not from improvements made upon them, nor from the discovery of any new sources of profit, but from extrinsic causes, as the increase of commerce or population, it may be a question whether, on the *extendi ad valentiam*, the lands to be recovered in recompense would be valued at the increased price, so that the quantity might be proportionally reduced. (*Gore v. Brazier, supra.*)

In the assignment of dower in Massachusetts, the commissioners are to regard the annual income of the estate out of which the dower is to be assigned, and set off to the widow so much as will yield her one-third of such income, in parcels best calculated to the convenience of herself and the heirs, as has been before intimated. (*Leonard v. Leonard*, 4 *Mass. R.* 533. *Miller v. Miller*, 12 *ib.* 455. *Gen. Stat. ch.* 90, § 5.)

In the State of Kentucky, an allotment of dower in land aliened by the husband in his life-time, must include one-third in value of the estate, as it was when the alienee took possession. (*Mahoney v. Young*, 3 *Dana's R.* 588. *Wall v. Hill*, 7 *ib.* 175.) And the rule is substantially the same in the State of Mississippi. (*Woodbridge v. Wilkins*, 3 *How. R.* 360.) So also in Pennsylvania, the rule is similar, and improvements upon lands after alienation by the husband, are not to be included in the admeasurement of dower. (*Thompson v. Morrow*, 5 *Serg. & Rawle's R.* 289. *Van Doren v. Van Doren*, 2 *Penn. R.* 697. *Shirtz v. Shirtz*, 5 *Watt's R.* 255.) So also in the State of Ohio. (*Dunseth v. Bank of the United States*, 6 *Ohio R.* 76.) So also in Alabama. (*Birney v. Frowner*, 9 *Ala. R.* 901.) And so likewise, in the State of South Carolina, when land has been aliened by the husband, his widow is entitled to dower only according to the value of the land at the time it was aliened. (*Russell v. Gee*, 2 *Rep. Con. Ct.* 254. *Brown v. Duncan*, 4 *McCord's R.* 346.)

The ancient and settled rule of the common law was, that in all cases of alienation by the husband, the widow took her dower according to the value of the land at the time of the alienation, and not according to its subsequent increased or improved value; and it may be affirmed that as a general rule the same doctrine applies in the American States, when the widow is entitled to dower at all in the lands aliened by the husband during coverture. (*Vide* 4 *Kent's Com.* 66. *But vide* *Tod v. Bayler*, 4 *Leigh's R.* 498.) And so also it is the general rule that when the heir improves the estate after the husband's death, as by building or draining, or, if the property be more valuable, by other means at the time of the assignment of dower than at the husband's decease the widow will be entitled to have her dower of the lands so improved and become more valuable, without any allowance to the heir on either of these accounts, because, by the death of the husband, the widow's title to dower was consummate, and she was

entitled to an assignment of it immediately. And upon the same principle the widow must bear a proportion of the loss which may be incurred in an unavoidable diminution in the value of the lands during the time which intervenes between the death of her husband and the assignment of her dower. In other words, as between the heir and the widow, she is entitled to have her dower of the lands according to their value at the time she was entitled to have her dower assigned. This is the doctrine at common law, and as a general rule it is recognized both in this country and in England. (*Thompson v. Morrow*, 5 Serg. & Rawle's R. 289. *Park on Dower*, 256. *Doe v. Gwinnett*, 1 Gale & Dav. R. 180.)

§ 435. It has been affirmed as the current of authority in this country, that most unquestionably the widow is entitled to the benefit of any improvement by the *heir*; because the assignment of dower *relates back* to the death of the husband, but any improvements by a purchaser of the husband are not to be taken into the account, but dower is to be assigned in that case, according to the value of the land *at the time of the transfer*; and that, whether the improvements are made before or after the husband's death, or with or without notice of the widow's right of dower. If the property decreases in value, either through the fault of the heir or the purchaser, it seems the wife has no remedy, and must take dower according to the value of the assignment.

If, however, the land has increased in value not by the labors of the heir, or of the purchaser, but from extrinsic and collateral causes, as the increasing prosperity of the country, the erection of manufactories in the vicinity, and the like, the wife shall have the benefit of such increased value, or, in other words, the value at the time of allotment, excluding the *purchaser's* improvements. (*Bing. on Cov.* 318, note 3.) This aspect of the subject has been referred to before, and the rule stated is the doctrine in most of the states; though in New York and Virginia the rule has been adopted as we have seen, which confines the widow in cases of alienation by the husband, to one-third of the value at the time of the sale by the husband.

§ 436. A few words may not be out of place respecting the proof necessary to be made by the widow in her action to recover her dower, or the land set off to her by the commissioners appointed to admeasure her dower. There are certain rules which may be regarded as peculiar, though not exclusively applicable to this

class of cases. Thus if one tenant in common of land occupies the whole, and conveys it in fee, his grantor is estopped, in a writ of dower brought against him by the widow of the grantor, to deny the title and seisin of the latter in the whole estate. (*Wedge v. Moore*, 6 *Cush. R.* 8.)

The proceedings under the statute for the admeasurement of dower cannot be impeached in ejectment for the dower for any mere formal irregularity; if enough appears to show that the tribunal making the assignment had jurisdiction, it is sufficient. (*Jackson v. Waltermire*, 7 *Cow. R.* 353. *Jackson v. Nixon*, 17 *Johns. R.* 123. *Jackson v. Aspell*, 20 *ib.* 411.) The admeasurement of dower in the widow's ejectment is conclusive as to the part to which she is entitled, but is no evidence of her title. (*Jackson v. Randall*, 5 *Cow. R.* 168. *Jackson v. De Witt*, 6 *ib.* 316. *Jackson v. Churchill*, 7 *ib.* 287.)

In ejectment for dower against a grantee of the husband by *quitclaim deed*, or a person holding under such grantee, the defendant is not estopped from showing that the husband was not seised of such an estate in the premises as to entitle his widow to dower. (*Sparrow v. Kingman*, 1 *N. Y. R.* 242.) Indeed the rule would seem to be the same if the defendant in such a case holds under a *warranty deed* from the husband of the plaintiff. The doctrine of *estoppel*, which might apply between the grantor and grantee, cannot be set up by the widow of the grantor in her action for dower, for the reason that the covenants of her husband could not estop *her*. She must be regarded as neither a party nor privy, but a stranger to the conveyance, claiming by paramount title. An estoppel must be mutual, and therefore none exists in the case supposed. (*Id. Vide also Gaunt v. Wainman*, 3 *Bing. New Cases*, 69.) The contrary doctrine, however, was held by a current of authorities, from *Bancroft v. White* (1 *Caines' R.* 185), to *Sherwood v. Vandenhough* (2 *Hill's R.* 203); but those authorities are now overruled by the case of *Sparrow v. Kingman*, determined by the New York court of appeals. So also in the State of Maine the doctrine was asserted in several cases that the tenant against whom the widow brought her action for dower was estopped from denying that the wife was entitled to dower when the tenant claimed title derived from the husband. (*Kimball v. Kimball*, 2 *Greenl. R.* 226. *Nason v. Allen*, 6 *ib.* 243. *Haines v. Gardner*, 10 *Maine R.* 383. *Smith v. Ingalls*, 13 *ib.* 284.

Hamblin v. Bank of Cumberland, 19 *ib.* 66.) But this doctrine has been overruled in that state, and the contrary doctrine fully established. In one case where the point was made, Chief Justice Shepley thus disposed of it: "It is insisted that the tenant is estopped to deny the seisin of the husband, as he holds the estate by a title derived from him. While he may not be permitted to deny that the husband was seised, he may be permitted to show the character of that seisin, and that it was not such that his widow would be entitled to dower." (*Gammon v. Freeman*, 31 *Maine R.* 243.) In a much earlier case the same principle was indicated, though not fully established. (*Campbell v. Knight*, 24 *ib.* 232.) And in a case decided as late as 1862, the rule was fully settled that a tenant in an action of dower is not estopped from showing that the seisin of the husband was not such as to give his wife a right of dower when he or his grantor has accepted a deed of the premises from the husband and claims under it, although he may be estopped from denying the right of the husband to give the deed. (*Foster v. Dwinel*, 1 *Am. Law. Reg.* [*N. S.*] 604. *S. C.* 49 *Maine R.* 44.)

In New Hampshire the rule upon the subject is substantially the same as in Maine. (*Moore v. Esty*, 5 *N. H. R.* 479. *Vide also Hutchins v. Carlton*, 19 *ib.* 487.) And the same may be said of the State of Rhode Island, where it has been held that the acceptance of a deed-poll conveying with covenants of warranty lands purchased, and taking and holding possession under it, do not estop the grantee from disputing the grantor's title to such lands, prior to and at the time of the conveyance, upon a subsequent claim of dower in the lands by the widow of the grantor. (*Gardner v. Greene*, 5 *R. I. R.* 104.)

The doctrine in Massachusetts upon the subject is the same as at present recognized in New York and in Maine. (*Small v. Proctor*, 15 *Mass. R.* 495.) But the rule is different in New Jersey, and perhaps in some others of the states. (*English v. Wright*, *Cox's R.* 437.) Undoubtedly when the defendant in such a case holds under a conveyance from the husband of the widow, *prima facie* she is entitled to her dower; but the doctrine of *estoppel* cannot be properly applied to this class of cases. And it probably makes no difference whether the conveyance from the husband be a full covenant warranty deed or a simple quitclaim; the reasoning would be the same in each case. (*Finn v. Sleight*, 8 *Barbour's R.* 401. *Foster v. Dwinel*, *supra.*)

The widow in her action for dower can recover only upon the strength of her husband's title; and she must show a *seisin* in him during coverture, or she will fail in her suit. (*Poor v. Horton*, 15 Barb. R. 485. *Vide Keator v. Dimmick*, 46 ib. 158.) But the production of a deed conveying the legal title to the husband, proof that he was in possession of the land, and aliened it during the coverture, and that the defendant claims and holds it, are sufficient, in the absence of evidence, that he holds or claims under adverse title, or any fact inconsistent with the right of the widow to support her claim to dower against the husband's alienee. The widow is not bound to show a regular paper title. (*Wall v. Hill*, 7 Dana's R. 174. *Griggs v. Smith*, 7 Halst. R. 22.)

Under the Massachusetts statute in relation to the competency of a party to give testimony as to a matter in which the adverse party is dead, the demandant in a writ of dower is a competent witness to prove her husband's death. (*Flynn v. Coffee*, 12 Allen's R. 133.)

Parol evidence is admissible to prove that land granted to the husband of the demandant is the same land of which dower is demanded. (*Keefer v. Young*, 2 Har. & Johns. R. 53.) And in ejectment for dower, the admissions of the husband, while living, are competent in bar of the title of the widow. (*Van Duyne v. Thayer*, 14 Wend. R. 233.)

His possession of the land in which dower is claimed being proved, the husband's declarations are admissible to show its extent; and office copies of deeds have been held to be admissible for the same purpose, without proof of the execution of the originals. (*Forrest v. Trammell*, 1 Bailey's R. 77.) And in South Carolina it has also been held that, to support her claim for dower, a widow is not obliged to produce the title-deeds to her husband (*Smith v. Paysenger*, 2 Rep. Con. Ct. 59); but it is sufficient for her to show that her husband had been in possession during coverture; this raises a presumption of title in him. (*Forrest v. Trammell*, *supra*.) And the same doctrine has been recognized in Maine. (*Knight v. Mains*, 3 Fairf. R. 41.)

§ 437. With respect to the estate which the widow acquires by the assignment of her dower, the doctrine of the common law is that, although the title of the widow is consummate upon the death of the husband, she is not seised, but the heir, and she consequently claims through his *seisin*. But by the assignment of the

dower, the seisin of the heir is defeated *ab initio*, and the doweress is in of the seisin of her husband, as of the time when that seisin was first acquired. Or, as Mr. Cruise collects the rule from the elementary writers, the widow acquires an estate of *freehold* by the assignment, *without livery* of seisin; because dower is due of common right, and the assignment is an act of equal notoriety. As soon as dower is assigned, the widow holds by the institution of the law, and is in of the *estate of her husband*; therefore the heir is not considered as having ever been seised of that part of his ancestor's estate whereof the widow is endowed. (1 *Greenl. Cruise*, 172.) This is the rule at common law, and the same doctrine prevails in most of the American States. Thus, in the State of New York, it has been expressly determined by the court of appeals, that by the assignment of dower the seisin of the heir is defeated *ab initio*, and the heir is not afterward considered as ever having been seised. And also that a widow, after assignment of her dower in lands of which her husband died seised, is in possession of the seisin of her husband. Her title relates back to the time of the marriage, if the husband was then seised, and, if not then seised, it relates back to the time when he became seised. (*Lawrence v. Brown*, 5 *N. Y. R.* 394. *Lawrence v. Miller*, 2 *ib.* 245. *Fowler v. Griffin*, 3 *Sand. R.* 385.)

In the State of Massachusetts the rule upon the subject is substantially the same as at common law, and it has been there held, that a widow, having a right of dower, cannot lawfully enter after her husband's death until an assignment be made by the heir, or the tenant of the freehold, or in a course of legal proceedings. When the assignment is made, she acquires no new freehold, but is in by her husband, her seisin being deemed in law to be a continuation of her husband's seisin. (*Windham v. Portland*, 4 *Mass. R.* 384, 387. *Vide also Sheafe v. O'Neill*, 9 *ib.* 13. *Jones v. Brewer*, 1 *Pick. R.* 314, 317. *Conant v. Little*, *Ib.* 189, 191.) And the same rule has been expressly recognized by the courts in others of the states. (*Vide Weaver v. Crenshaw*, 6 *Ala. R.* 873. *Norwood v. Morrow*, 3 *Batt. R.* 448. *Ross v. Ross*, 12 *B. Mon. R.* 437.) A right of way assigned to a dowager over land of her husband, with her dower, is appurtenant to her estate and expires with it. (*Hoffman v. Savage*, 15 *Mass. R.* 130.)

At common law, when the widow's dower is assigned, her title has such a relation to her husband's first and original seisin of the

estate, and the period of the marriage, as to defeat not only all charges and incumbrances which he alone made during the coverture after acquiring the estate, but also all debts which he contracted during the marriage, in respect of which such property might be affected, without regard to the circumstance whether the debts were owing to a private individual or to the crown. (*Fullwood's case*, 4 *Coke's R.* 64. And *vide Gilb. Dōw.* 407-411.) So also the widow at common law holds her dower discharged from leases made by her husband during the coverture, and she is not bound by his release of a rent. (*Stoughton v. Leigh*, 1 *Taunt. R.* 404-410. *Co. Litt.* 32.) But if the incumbrances have been effected by the husband before the marriage, by securities which did not prevent his widow's title to dower of the estate, her endowment will not suspend the rights of the creditors against the third part of the lands assigned to her in dower, because her title, having relation only to the time when the marriage was solemnized, is preceded by the securities of the incumbrances, who are therefore entitled to a priority; consequently she will be liable to them for the amount of their demands, to the extent even of the whole of her dower. (*Vide Jones v. Griffith*, 2 *Coll. N. C.* 207. *Palmer v. Danby*, *Prec. Ch.* 137; *Williams v. Wray*, *Ib.* 151. *Hamilton v. Mohun*, 1 *P. Wms. R.* 118. *Squier v. Compton*, 2 *Eq. Ca. Abr.* 387. *White v. White*, 9 *Ves. R.* 554. *Hitchens v. Hitchens*, 2 *Vern. R.* 403.) But it is presumed that, as against her husband's general estate, she would be entitled to have her dower exonerated from such incumbrances. If, however, the debts are not of the husband's contracting, as when the estate descends to him before the marriage charged or incumbered, the widow must take her dower *cum onere*; for his own personal property is not liable to answer for the debts of other persons, and consequently not in the present instance, to exonerate the dowable estate from incumbrances so made upon it. (*Vide 1 Bright's Husb. and Wife*, 500.) Such is the common law rule with respect to incumbrances upon the estate in which the widow has her claim of dower, and the same doctrine is generally recognized in the United States. Though in England, at the present time, the widow's dower is subject to all incumbrances created by the husband, and to all debts and incumbrances to which the land is liable. (3 & 4 *Wm. IV*, *ch.* 105, § 5.) And the same rule has been incorporated into the statutes of several of the states.

CHAPTER XXX.

POWER IN EQUITY — JURISDICTION OF EQUITY — PRACTICE IN EQUITY
FOR THE RECOVERY OF DOWER — COSTS IN PROCEEDINGS FOR DOWER —
THE WIDOW'S POWER OVER THE LAND ASSIGNED HER — HER LIABILITY
FOR WASTE — HER RIGHT TO EMBLEMENTS — HER LIABILITIES ON
TAKING POSSESSION OF THE ESTATE.

§ 438. In some respects a court of equity is the most complete and appropriate forum afforded the widow for the recovery of her dower. In a court of equity there are fewer embarrassments from forms of proceeding than at law, and obstacles which improperly tend to delay or defeat the widow of her rights are also more readily removed in equity than at law. It was formerly made a question as to how far courts of equity should entertain general jurisdiction in cases of dower, where no obstacle appeared to the legal remedy of the widow; but it is now well settled that a court of equity has a concurrent jurisdiction with a court of law upon this subject. The principle upon which this concurrent jurisdiction is entertained is said to be intelligible and reasonable; that is, that the widow labors under so many disadvantages at law from the embarrassment of trust terms and the like, and from an ignorance of the titles, values and quantities of the lands of which her husband was seised, that she is entitled and ought to have every assistance that a court of equity can give her, not only in paving the way to establish her right at law, but also by giving complete relief when the right is ascertained. (*Curtis v. Curtis*, 2 Bro. Ch. R. 634.) And when the widow brings her action in a court of equity for the assignment of her dower, it is not necessary to charge in her bill that there is any impediment to her obtaining an endowment at law. If the title to dower is admitted, and nothing is to be done but to assign it, it would be useless to send the matter to a court of law, and the court may proceed at once to the assignment of dower. (*Mundy v. Mundy*, 2 Ves. Jun. R. 122. S. C. 4 Bro. Ch. R. 294.) But if the title to dower is disputed, that must be established by an issue at law, the court in the mean time retaining the bill, and assisting the widow in trying her right, and deriving the full benefit of it, when it is determined in her favor at law, and giving her possession according to her right. (*Curtis v. Curtis*, *supra*. *Mundy v. Mundy*, *supra*.) A commission usually issues, however, to set out and assign the dower. (*Wild v. Wells*,

1 *Dick. R.* 3. *Lucas v. Calcraft*, 2 *ib.* 594. *Morgan v. Ryder*, 1 *Ves. & Beame's R.* 20.) But the decree sometimes directs the master to assign the dower. (*Goodenough v. Goodenough*, 2 *Dick. R.* 795. *Bamford v. Bamford*, 5 *Hare's R.* 206.)

When the marriage is disputed, it has been the practice to send the case to a court of law to be adjudicated. However, witnesses are sometimes examined in the court of equity upon the issue upon the plea *ne unques accouple*. (*Poole v. Poole*, *Young's Eq. Ex. R.* 331.)

§ 439. Judge Story affirms, that "there are some cases in which the remedy for dower in equity seems indispensable at law; if the tenant dies after judgment, and before damages are assessed, the widow loses her damages; and so, if the widow herself dies before the damages are assessed, her personal representatives cannot claim any. But a court of equity will, in such cases, entertain a bill for relief, and decree an account of rents and profits against the respective representatives of the several persons who may have been in possession of the estate since the death of the husband; provided, at the time of filing the bill, the legal right to damages is not gone." (1 *Story's Eq. Jur.* § 625, citing *Curtis v. Curtis*, 2 *Bro. Ch. R.* 632. *Dormer v. Fortescue*, 3 *Atk. R.* 130. *Mordant v. Therold*, 3 *Lev. R.* 275.)

And, further, the learned judge says: "Upon principle there would not seem to be any real difficulty in courts of equity in all cases of dower; for a case can scarcely be supposed in which the widow may not want, either a discovery of the title-deeds, or of dowable lands, or some impediment to her recovery at law removed, or an account of mense profits before the assignment of dower, or a more full ascertainment of the relative values of the dowable lands; and, for any of these purposes, independent of cases of accident, mistake, or fraud, or other occasional equities, there seems to be a positive necessity for the assistance of a court of equity. And if a court of equity has once a just possession of the cause in point of jurisdiction, there seems no reason why it should stop short of giving full relief, instead of turning the doweress round to her ultimate remedy at law, which is often dilatory and always expensive. Dower is favored as well in law as in equity. And the mere circumstance that a discovery of any fact may be wanted to enforce the claim, would, under such circumstances, seem to furnish a sufficient reason why the jurisdic-

tion for discovery should carry the jurisdiction for relief." (1 *Story's Eq. Jur.* § 626, citing *Dormer v. Fortescue*, 3 *Atk. R.* 130. *Moor v. Black*, *Cas. Temp. Talb.* 126. *Herbert v. Wren*, 7 *Cranch's R.* 370, 376. *Curtis v. Curtis*, 2 *Bro. Ch. R.* 632. *Mundy v. Mundy*, 2 *Ves. Jun. R.* 122. *S. C.* 4 *Bro. Ch. R.* 294. *Graham v. Graham*, 1 *Ves. R.* 262. *D'Arcy v. Blake*, 2 *Sch. & Lefr. R.* 389, 390. *Powell v. The Monson Man. Co.* 3 *Mason's R.* 347.) And it is said by the English parliamentary commissioners, that "the necessity for a discovery to ascertain the state of the legal title, before a widow can safely resolve to commence an action against any person as tenant of the freehold, and the convenience of a commission for setting out her dower under the authority of a court of equity, generally make it expedient that a suit in equity should be instituted." (2 *Report of Common Law*, 1830, p. 7.)

§ 440. The case of the doweress has been said to be upon a principle somewhat, though not entirely, analogous to that of the heir. An indulgence has been allowed to her case upon the great difficulty of determining *a priori* whether she could recover at law, ignorant of all the circumstances; and the person against whom she seeks relief, having in his possession all the information necessary to enable her to establish her rights, therefore it is considered unconscientious in him to expose her to all that difficulty, to which, if that information was fairly imparted, as conscience and justice require, she could not possibly be exposed. (*Pultney v. Warren*, 6 *Ves. R.* 73, 89.) This certainly presents a very strong reason why a court of equity should have jurisdiction in these cases of dower; and, as before stated, it is now well settled, that courts of equity have a general concurrent jurisdiction with courts of law in all matters of dower, and the propriety of maintaining it has been so long and so well vindicated, that it has ceased to be questioned. The widow's dower is favored in the law, and proceedings having in view its enforcement or establishment is encouraged, rather than defeated; and this rule makes it peculiarly proper that courts of equity should take cognizance of the widow's claim in such cases. (*Vide Matter of Sipperly*, 44 *Barb. R.* 370.) Indeed, the right that a doweress has to her dower is not only a legal right, but it is also a moral right, to be provided for and have a maintenance and sustenance out of her husband's estate to live upon. She is, therefore, in the care of the law, and a favorite of the law. So much is this the case that the widow will be aided in equity for her dower

against a term of years, which attends the inheritance, if it is not the case of a purchaser against whom she claims. And if she has recovered her dower against an heir who is an infant, and there is a term to protect the inheritance, which, by the neglect of his guardian, is not pleaded, the term will not be allowed in equity to be set up against her. Such Judge Story understands to be the doctrine of the authorities. (1 *Story's Eq. Jur.* § 629. *Vide also Dudley v. Dudley*, *Prec. Ch.* 241. *Banks v. Sutton*, 2 *P. Wms. R.* 703, 704. *Radnor v. Vandeburdy*, 1 *Vern. R.* 356. *D'Arcy v. Blake*, 2 *Sch. & Lefr. R.* 389, 390. *Mole v. Smith*, 1 *Jac. R.* 496, 497. *Swannock v. Lyford*, *Ambl. R.* 6, 7. *Hitchins v. Hitchins*, 2 *Freem. R.* 242.)

§ 441. Whether a plea of a purchase for a valuable consideration without notice is a defense when a widow institutes proceedings in equity for her dower, is a question which has been much discussed, and the authorities are by no means uniform on the subject. In an early case in the English court of chancery it was decided that a widow who filed her bill for dower against the purchaser of the lands from her husband during the marriage, praying a discovery of them, and an assignment of dower, could not be defeated of either by a plea that the tenant was a purchaser for a valuable consideration without notice. (*Williams v. Lambe*, 3 *Bro. Ch. R.* 264.) And a similar rule has been acted upon in other cases in the same distinguished court; and, upon the authority of *Williams v. Lambe*, it has been held, in general terms, that a purchaser for a valuable consideration, without notice, has no defense in equity against a plaintiff relying upon a legal title. (*Rogers v. Seale*, 2 *Freem. R.* 84. *Collins v. Archer*, 1 *Russ. & Mylne's R.* 284. *Medlicott v. O'Donell*, 1 *Ball & Beatty's R.* 171.) On the contrary, Mr. Bright affirms that the principle that equity will not interfere against a purchaser for a valuable consideration without notice, is commonly laid down in general terms without reference to the nature of the plaintiff's title; and he seems to think it now to be well settled that a plea of a purchase for a valuable consideration without notice is a defense to the widow's action in equity. (1 *Bright's Hus. and Wife*, 421, 422.) So also Sir Edward Sugden, in his treatise on vendors and purchasers, after citing the authorities, concludes with remarking that the point can hardly be considered as concluded by the weight of authority; but in the last edition of his work he seems to maintain that the authorities preponderate

in favor of the sufficiency of the plea against a legal title, and that upon principle such a plea should stand good. (2 *Sugden on Vendors*, 577, 578, 7th American edition.) And there are numerous authorities which, in principle, sustain this view. The general doctrine that the plea of a purchase for a valuable consideration without notice is good against a legal as well as against an equitable claim, is universally conceded, and the authorities cited by Messrs. Bright and Sugden to sustain their position make no exception in case of dower. (*Vide Burlac v. Cooke*, 2 *Freem. R.* 24. *Parker v. Blythmore*, 2 *Eq. Abr.* 79. *Jerrard v. Saunders*, 2 *Ves. Jun. R.* 454. *Robinson v. Hayns*, *Gilb. Eq. R.* 184. *Worcester v. Parker*, 2 *Vern. R.* 255. *Hoare v. Parker*, 1 *Cox's R.* 224. *Payne v. Compton*, 2 *You. & Coll. Eq. R.* 457, 461. *Bowen v. Evans*, 1 *Jones & Lat. R.* 263. *Joyce v. DeMoleyns*, 2 *ib.* 374.)

Mr. Beames, Mr. Belt, and Mr. Roper—all able elementary writers—support the doctrine that the plea of purchase for a good consideration, without notice, is no defense in a case of dower. (*Beam. Pl. Eq.* 234, 245. *Williams v. Lambe*, 3 *Bro. Ch. R.* 264. *Belt's*, note 1. 1 *Roper's Husband and Wife*, 446, 447.)

Judge Story, referring to the decision of *Williams v. Lambe*, says: "It has been often found fault with, and, in some cases, the doctrine of it denied. It has, however, been vindicated with great apparent force, upon the following reasoning. It is admitted that dower is a mere legal right, and that a court of equity, in assuming a concurrent jurisdiction with courts of law upon the subject, professedly acts upon the legal right, for dower does not attach upon an equitable estate. In so doing the court should proceed in analogy to the law where such a plea of a purchase for a valuable consideration, without notice, would not be looked at; and, therefore, as an equitable plea, it should also be inadmissible." (1 *Story's Eq. Jur.* § 630.) The learned judge refers to the fact that other minds have arrived at a different conclusion, and says: "They put themselves upon the general principle of conscience and equity, upon which such a plea must always stand; that such a purchaser has an equal right to protection and support as any other claimant; and that he has a right to say that, having *bona fide* and honestly paid his money, no person has a right to require him to discover any facts which shall show any infirmity in his title. The general correctness of the argument cannot be doubted; and the only recognized exception seems to be that of dower, if that can be

deemed a fixed exception." (*Ib.* § 631.) The judge finally concludes that in a case of such a conflict of learned opinions, a commentator's duty is best performed by leaving the authorities for the reader's own judgment, and therefore he gives no decided opinion as to what ought to be the rule, or to which side of the question the authorities preponderate. (*Ib.* note 2.) The question will probably depend somewhat upon the provisions of the statute with respect to what the widow shall be endowed. Where the law is, as in New York, that she shall be endowed of the third part of all the lands whereof her husband was seised of an inheritance at any time during the marriage, it is not probable that her dower can be defeated by the plea that the tenant is a purchaser for a valuable consideration without notice.

When the widow applies for equitable relief, as for the removal of terms out of the way, it seems to be conceded that the plea of a purchase for a valuable consideration without notice cannot be resisted. (*Vide D'Arcy v. Blake*, 2 Sch. & Lefr. R. 390.)

§ 442. As a general rule, dower is recovered and admeasured in the United States in a court of law. A court of equity is seldom resorted to for that purpose. There are cases, however, where it is very convenient, and almost indispensable to invoke the aid of a court possessing equitable jurisdiction. Whenever the widow's title is admitted, but impediments are thrown in the way of her proceeding at law, a court of equity is the proper forum in which to institute her proceedings. (*Swaine v. Perine*, 5 Johnson's Ch. R. 482.)

Generally, a widow is entitled to dower in the equity of redemption of an estate mortgaged by her husband before coverture, but she must resort to a court of equity to recover it. In such a case her remedy is confined to a court of equity, and her rights can be enforced only in that forum. Her claims cannot be enforced against the mortgagee, or those claiming under him. (*Van Duke v. Thayer*, 19 Wend. R. 162. *Cooper v. Whitney*, 3 Hill's R. 95. *Smith v. Gardner*, 42 Barb. R. 356.) The same rule applies when the mortgage is executed by the husband and wife during coverture. In such a case, the widow must come into a court of equity to recover her dower, and may redeem the land from the mortgage so far as her dower interest is concerned, by the payment of her proportion of the mortgage debt. She would have this right even though the mortgage had been foreclosed provided the wife was

not a party to the foreclosure suit. Her inchoate right of dower, as has been before observed, is not divested by a sale had on such a decree of foreclosure. (*Vide Denton v. Nanny*, 8 *Barb. R.* 618. *Wheeler v. Morris*, 2 *Bosw. R.* 524.) When the premises in which the widow claims dower are in the possession of a tenant whose term has not expired, and the heir refuses to assign her dower, the widow's bill for dower will be sustained. This was so held by the late court of chancery of the State of New York, upon the recognized theory, that a court of equity has concurrent jurisdiction with a court of law in suits for the recovery or assignment of dower. In such case, if the right of the widow is admitted by the answer, the court will proceed at once to assign the dower; and to take an account of the arrears, if it is a case in which she can recover damages. But if her right is disputed, the court will retain the bill, and direct a suit at law to ascertain the title. This is the rule as settled in England before referred to, and it is distinctly recognized by the American courts. (*Badgley v. Bruce*, 4 *Paige's Ch. R.* 98.)

So also a similar jurisdiction is exercised in others of the American States, in their equity courts. Thus, in one case in the State of Virginia, the widow had filed her bill in equity against her infant children for the assignment of her dower, and had a decree thereon. And the judge who delivered the opinion in the court of appeals said, that the widow might have filed her bill at the first court after her husband's death, thereby recognizing the doctrine that the jurisdiction of the equity courts in matters of dower is well settled in that state. (*Grayson v. Moncore*, 1 *Leigh's R.* 449. *Tod v. Baylor*, 4 *ib.* 498.) The court of appeals in the State of Maryland has also decided that the court of chancery in that state has jurisdiction to decree dower to the widow, and rents and profits from the death of the husband, and it was said in the same case that when the title is controverted, it must be made out at law. But the judge who delivered the opinion of the court said, that it did not follow that the complainant's bill is to be dismissed because the right of dower is denied by the defendants; but that the chancellor should retain the bill a reasonable time, until the right at law is established. (*Wells v. Beall*, 2 *Gill & Johns. R.* 464.) And in the same state, when an action at law has been brought for dower against the alienee of the demandant's husband, and a judgment was given for the demandant upon the plea

of the non-seizure of the husband during coverture; after which the widow filed her bill in equity against the same party to recover mesne profits, the court held that the proceedings in equity were properly instituted; that the widow could only recover damages from the alienee of her husband for the detention of her dower, in a court of equity, and that a court of law could not award them. (*Sellman v. Bowen*, 8 *Gill & Johns. R.* 50. And vide *Steiger v. Hillen*, 5 *ib.* 121.)

In the State of Kentucky, also, it appears the courts of equity have an acknowledged jurisdiction in cases of dower. And the reports of the court of appeals in this state contain many cases in which bills have been filed to obtain assignments of dower, and to recover the arrears of dower from the death of the husband. (*Kendall v. Honey*, 5 *Mon. R.* 283. *Jones v. Todd*, 2 *J. J. Marsh. R.* 359. *Stevens v. Smith*, 4 *ib.* 64.)

And in the State of New Jersey, it has been expressly held that courts of law and equity hold a concurrent jurisdiction in relation to dower and partition; and that in many cases there is an indispensable necessity for the exercise of this jurisdiction by a court of equity. That if the legal title of the complainant be denied, it is in the power of the court to send that question to be tried at law, and that such is the universal practice; thus recognizing the rule as laid down in the State of New York to the fullest extent. (*Hartshorne v. Hartshorne*, 1 *Green's Ch. R.* 349.)

But in the State of North Carolina, it has been held that dower having been assigned to the widow upon a partition at law, equity will not entertain a bill for the detention of the dower, unless there be some equitable circumstance, such as loss of title deeds, or detention of such deeds, or a discovery is necessary. (*Whitehead v. Chynch*, 1 *Murphy's R.* 128.) And in the State of New York, where a bill was filed to restrain a widow from proceeding at law to recover her dower, the court determined the case in favor of the widow, and decreed that she was entitled to her dower, but declined further jurisdiction, and dismissed the bill; the chancellor remarking that he did not understand the usual practice in such cases to be to proceed to the assignment of the dower, but that dismissing the bill upon the merits, after decreeing that the widow was entitled to her dower, settled the rights of the parties conclusively as to all the questions which the court was called upon to decide, and that the widow might then proceed and enforce

her rights in the suit at law. (*Sanford v. McLean*, 3 *Paige's Ch. R.* 117.)

It may be affirmed, however, as a general rule, in the United States, as well as in England, that courts of equity will entertain a concurrent jurisdiction with courts of law in the assignment of dower.

§ 443. As a general rule at law mesne profits, under the term damages, are lost by the death of either the plaintiff or defendant before they are assessed and ascertained. But this is not the rule in equity. A court of equity is more liberal to the widow, from the consideration that the profits of a third part of the husband's real estates are her only subsistence from his death. It is, therefore, the course of a court of equity to assign to her dower, and universally to give her an account of mesne profits from the death of her husband, and not to permit her title to them to be defeated by the death of the tenant *pendente lite*, upon the principle that it would be unjust if the heir's denial of her right to dower, and the accident of his death before the establishment of it, should be allowed to place her in a worse situation than if he had thrown no impediment in her way, and fairly and candidly admitted her claim. (*Curtis v. Curtis*, 2 *Bro. Ch. R.* 620. *Johnson v. Thomas*, 2 *Paige's Ch. R.* 377.) And by reason of this, it has been held that the length of time which may have elapsed since the husband's death, although it may have exceeded six years prior to the bill being filed, will not narrow the rule nor confine the account to the six years preceding the exhibition of such bill, in analogy to the statute of limitations. (*Oliver v. Richardson*, 9 *Ves. R.* 222.) But now, by the statutes of England, no arrears of dower, nor any damages on account of arrears, are to be recovered or obtained by any action or suit for any longer period than six years before the commencement of the action or suit. (3 and 4 *William IV*, ch. 27, § 41. *Bamford v. Bamford*, 5 *Hare's R.* 203.) A similar rule has been incorporated into the statutes of several of the American States; and, after all, the right to arrears in equity is about the same as at law, except, perhaps, in one case where the tenant may die after the commencement of the action and before the dower is assigned, when the ordinary principle of equity, that the decree is to be made according to the rights of the parties as they exist at the institution of the suit, will prevail and save the arrears.

In consideration of the widow requiring the profit of her dower for immediate support, if her claim form an ingredient only in the suit, and several matters are referred to a master to inquire into and make a general report, the court will not delay the payment of arrears of the widow's dower until the general report is made, but it will direct the master to make an immediate separate report of what is due to her for arrears, in order that she may receive them for her maintenance. (*Eccleston v. Berkley, Ridgw. Ca. Temp. Hardw.* 253.)

It is the general rule of the court in England not to allow interest upon arrears of dower, and the rule has been considered to be so absolute as to render it doubtful whether it will be relaxed in the most distressing cases. (*Ferrers v. Ferrers, Forest's R.* 2. *Batten v. Earnly*, 2 *P. Wms. R.* 163. *Robinson v. Cumming*, 2 *Atk. R.* 411. *Newman v. Auling*, 3 *ib.* 579.) But no case can probably be found holding that a widow, under no circumstances, shall receive interest upon the money arising from her dower, improperly detained from her by the person who ought to have assigned it; and there are cases going to show that circumstances might exist to warrant a departure from the general rule upon the subject. (*Anderson v. Dwyer*, 1 *Sch. & Lefr. R.* 303. *Burton v. Todd*, 1 *Swan. R.* 255.) And in the State of New York, it has been held that the widow is entitled to interest or mense profits up to the time her dower is assigned to her. (*Gordon v. Stevens*, 2 *Hill's R.* 429.)

§ 444. With respect to costs in proceedings for dower in equity, they are in the discretion of the court, and that discretion is regulated by the conduct of the parties. Thus, when the widow's suit is for the single purpose of obtaining an assignment of dower, costs are not allowed to the doweress if there has been no vexation or undue hinderance to her claim, or other misconduct on the part of the defendant. (*Lucas v. Calcraft*, 1 *Bro. Ch. R.* 134. *Curtis v. Curtis*, 2 *ib.* 632. *Hazen v. Thurber*, 4 *Johns. Ch. R.* 604. *Hale v. James*, 6 *ib.* 258. *Mundy v. Mundy*, 2 *Ves. Jun. R.* 128.)

If, however, the defendant's opposition be vexatious, or if he fraudulently withhold her dower, he will be saddled with the costs of the suit. (*Morgan v. Ryder*, 1 *Ves. & Beames' R.* 20. *Outhwaite v. Outhwaite*, *Beames on Costs*, 36.) Or, if the defendant refused before suit, upon reasonable request, to assign dower or pay an

equivalent, the widow will have costs; but if she files her bill without having made such application, and claims more than she is entitled to from him, costs will be given to neither party. (*Russell v. Austin*, 1 *Paige's Ch. R.* 192.)

If the defendant sets up any ground of defense which fails, he may be liable to the costs thereby occasioned. (*Bamford v. Bamford*, 5 *Hare's R.* 205.)

§ 445. In relation to the power which the widow has over the land assigned her for her dower, and her rights in respect of it, it may be suggested that, as she has only a freehold interest for life in the third part of her husband's freehold estates, she cannot legally dispose of it for a longer period than during her natural life. This, of course, is obvious from the fact that her interest is only that of a tenant for life.

The widow may grant leases of or otherwise incumber her estate in dower to the extent of her life interest, so that if she demise it for years, reserving a rent, it will be good, and if she die, and rents be in arrear, her executor or administrator will be entitled to them.

The doweress must not commit waste by felling timber trees, pulling down buildings, opening mines or pits, changing the course of husbandry, destroying heirlooms or other things which are not included in the temporary profits of the land assigned to her. In this respect the doweress stands upon the same footing with other tenants for life, unless an exception is made in her favor by express statute.

The doweress, like other tenants for life, is entitled, in the ancient but well defined language of the law, to reasonable and customary *estovers*, such as *house-bote*, *fire-bote*, *fence-bote*, and *plow-bote*; but she is not permitted to cut and take off any of the timber for sale, or for any other purpose than to provide necessary fuel, repair and rebuild the fences, and keep up the buildings upon the land; and if she do any act of a permanent injury to the inheritance, except to take her reasonable estovers, she is guilty of waste, and may be proceeded against for the damages, or a court of equity will grant an injunction to restrain her from further damage.

In those states, however, where a widow is dowable of wild and forest lands, she may clear up and take off the timber from a reasonable portion of the premises assigned to her, in order that she may enjoy the benefit of her dower right. (*Hastings v. Crun-*

leton, 3 Yeates' R. 261. *Findlay v. Smith*, 6 Munf. R. 134, 148.) And in the State of North Carolina it was held that the widow might convert timber into staves and shingles, where such had been the ordinary and was the only beneficial use to which she could make of the land assigned to her. (*Ballentine v. Payner*, 2 Hayw. R. 110.) And again, in Tennessee, it was decided that she might cut down the timber for any necessary uses, provided she left enough standing upon the premises for permanent use, and the estate was not essentially injured by taking off the timber cut. (*Owen v. Hyde*, 6 Yerg. R. 334.) And generally, when a prudent owner of the land would clear off the timber, and by doing so the value of the entire premises would be enhanced, the widow will be justified in taking such timber off, and in doing so will not be liable for waste, (*Givens v. McCalmont*, 4 Watts' R. 463. *Chase v. Hazelton*, 7 N. H. R. 171. *Keeler v. Eastman*, 11 Vt. R. 293.) She must in no event, however, cut and take off *all* of the timber standing upon the land, for that would be considered a permanent injury to the premises, and waste. (*Jackson v. Brownson*, 7 Johns. R. 227. *Hicken v. Irvine*, 3 Dana's R. 123. *Parkins v. Cowe*, 2 Hayw. R. 339. *Keeler v. Eastman*, *supra*. *Padelford v. Padelford*, 7 Pick. R. 152. 1 *Greenl. Cruise on Real Prop.* 116, note 2.) It has been held in Massachusetts, that when oak and other timber is so abundant that such trees are customarily used for fuel, the tenant may cut them for that purpose. (*Padelford v. Padelford*, *supra*.) But in the State of New York, it has been decided that a tenant for life has no right to dig up the soil and cut down valuable timber, and use the same for making brick for sale off the premises; and it was even doubted whether the clearing the land of its timber and reducing it to cultivation, when the same would be a benefit rather than an injury to the general estate, would not be an act of waste, and it was added that injury in such a case was not the *test of waste*, but disherison of him in remainder or reversion. (*Livingston v. Reynolds*, 26 Wend. R. 115, 122.) And a similar *quere* was expressed in one case in the State of Tennessee. (*Owen v. Hyde*, *supra*.) The doweress must not pull down or destroy the buildings upon the land assigned her, nor alter them injuriously, nor suffer them to be uncovered, whereby the timbers become rotten. (*Vide Douglass v. Wiggins*, 1 Johns. Ch. R. 437. *Bennett v. Sadler*, 14 Ves. R. 526. *Doe v. Jones*, 4 Barn. & Ad. R. 126. *Hasty v. Wheeler*, 3 Fairf. R. 434, 439.)

With respect to mines or ore beds in the lands assigned to the widow for her dower, the rule seems to be that the opening and working such mines, including ore beds, for the first time by the widow, will be regarded as an act of waste; but if the mines were opened and worked during the life-time of the doweress' husband, she is entitled to work them, although she cannot legally profit by any extension of that opening. (*Coates v. Cheever*, 1 Cow. R. 460, 474. *Stoughton v. Leigh*, 1 Taunt. R. 402.) What is not waste in a tenant under a lease, will not be so considered in tenants in dower, as there is an analogy or agreement in principle between the two tenancies.

§ 446. In England, where their system of agriculture, from the peculiar circumstances and necessity of the case, is more fixed and regular than in this country, the conversion not only of woodland, but even of meadow and pasturage, into arable, and the reverse, as well as that of meadow and pasturage into woodland, and the reverse, would be deemed waste. But these strict rules of the old world have never been adopted in all their rigor among the broad and fertile acres of our own young and free country, and in many of the states, either by statute or express judicial decisions, the doweress may do many acts which in England would be waste. Thus, in Massachusetts, when the husband leaves no issue, and the widow elects to take half the real estate, consisting of wild or woodland, she may clear and improve it. In Vermont, New York and Ohio, if the land assigned is wholly wild and uncultivated, the tenant may clear a part of it for cultivation, leaving, however, enough for the permanent use of the farm and consistent with good husbandry, which is a point of fact for the jury. So, in North Carolina, as before stated, the doweress is permitted to cut timber to make into shingles and staves, if this is the common and only beneficial use of the land. So, in New Hampshire, the consumption of necessary fuel at the residence of the widow, cut from the dower land, she not residing thereon, is not waste. So, in Maine, it is not waste to cut wood for necessary fuel and repairs. So, in Pennsylvania, Virginia and Tennessee, tenants in dower have been allowed to clear wild land, not exceeding (in the former state) a just proportion of the whole tract. This is substantially the statement made by Mr. Hilliard in his treatise on the American law of real property, and some of it is a repetition of matters stated in the last preceding section; but the rule in the several

states upon the subject is so intelligently condensed by Mr. Hilliard that it was thought best to insert his statement in this place. (*Vide* 1 *Hill. on Real Prop.* 263.)

In the State of New York it is expressly provided by statute that if any tenant in dower, among others, or the assigns of any such tenant, shall commit waste during her term, of the houses, gardens, orchards, lands or woods, or of any other thing belonging to the tenements so held, without a special and lawful license in writing so to do, she or they shall be subject to an action of waste; and if the plaintiff prevail in the action, the judgment shall be that the plaintiff recover the place wasted and treble the damages found by the jury. (2 *R. S. part 3, ch. 5, tit. 5, §§ 1, 10.* 2 *Stat. at Large*, 344.) And similar provisions are contained in the statutes of other states. The rule of the common law is, that the committing of waste by the widow is a forfeiture of the estate. (*Conner v. Shepherd*, 15 *Mass. R.* 164. *Allen v. McCoy*, 8 *Ohio R.* 418.) Although this rule is no part of the common law of some of the states. (*Allen v. McCoy, supra.*)

§ 447. With respect to the widow's right to emblements, her right to them is indisputable in England, for by the statute of Merton the tenant in dower is expressly empowered to dispose of the corn growing upon her estate at the period of her death. (20 *Hen. III. ch. 2.*) It is said that this act was passed to remove the doubt which previously existed upon the subject. It was unquestionable that the widow was entitled to the benefit of the corn growing upon the third part of the lands assigned to her, if there happened to be any growing thereon at that time, and it was thought the advantages received by her at the commencement of her estate, should be a satisfaction of those of the same kind which she would otherwise have been entitled to when her estate expired. This peculiarity attending the widow's estate distinguished it from that of other tenants for life who are entitled to emblements; and to settle the law in this matter was the object of this provision of the statute of Merton, which places the widow in the same situation in regard to emblements as a tenant for life. Her power of disposition under the statute was not merely extended to corn growing at the time of her death, but to roots planted, and to other animal and artificial profits, such as hemp and flax, and hops, although growing upon ancient roots, and to other things which are yearly produced by the industry of man. If the widow omit to

dispose of such emblements, they will belong to her executor or administrator, who may retain possession of the lands until they can be reasonably carried away.

From the fact that the tenant in dower is placed upon the same footing in regard to emblements, as a tenant for life, it of course follows that the same principles will regulate her right to them as are applicable to other tenants for life. The fundamental reason for admitting such right is to encourage husbandry, by allowing the tenants a full compensation for their labor and expense in tilling, manuring, and sowing the lands.

If the widow, after assignment of dower, sow the lands and marries, and her second husband, after appointing executors, dies before the crop is severed, his surviving widow will be entitled to it. But the executor, and not the widow, would have been entitled to the crop if it had been sown by the husband, because he was at the expense of sowing it. (*Vide* 1 *Bright's Husband and Wife*, 393, 394.)

§ 448. The English rule with respect to the widow's right to emblements is generally recognized in the United States. With some exceptions, it is held that if a husband sow the lands, and die before a severance, and the widow be endowed of that land, she, and not the executor, shall have the emblements, and this is put expressly upon the ancient rule of the common law, that a widow, who is endowed, shall have land cultivated, or not cultivated, with all the crops and produce growing thereon; and that the doweress is entitled to the emblements, because dower is considered as an excrecence, or continuance of the estate of the husband. (2 *Bracton*, 96. *Fisher v. Fisher*, *Viner's Abr. Pl.* 82.) It has, however, been held by the court of appeals of the State of New York, that the grapes and fruits growing upon lands belonging to an intestate at the time of his decease, are not assets belonging to the administrator, but descend with the land to the heir; and that a widow, in receiving the fruits and grapes growing on her husband's lands at the time of his death, is liable to the heir for their *full value*, and cannot retain one-third on account of her right of dower in the lands. But the judge who delivered the opinion of the court, stated that if the land on which the grapes and fruits in question were growing at the time of the husband's death, had been assigned to the widow for her dower, she would thereupon have become entitled to the grapes and fruits growing on the

lands. (*Kain v. Fisher*, 6 *N. Y. R.* 597, 598.) And in the State of Iowa, it has been expressly decided that wheat growing upon land set off to the widow as her dower, belongs to her and not to the heirs of her husband. (*Ralston v. Ralston*, 3 *Iowa R.* 533.) By the common law, the tenant in dower could not devise the emblements growing on the land; neither would the emblements, in case there was no devise, go to the executor of the wife, but they belonged to the reversioner. But this rule of the common law, as we have seen, was changed in England by the statute of Merton in favor of widows, and they were placed on the same footing as other tenants for life. In some of the American States, the common law rule prevails, while in others the rule in England has been adopted. Thus, in the State of New York, it is provided by statute that a widow may bequeath the crop in the ground of the land holden by her in dower. (1 *R. S. part 2, ch. 1, tit. 3, § 25. 1 Stat. at Large*, 695.) And similar provisions are found in the statutes of some of the other states.

§ 449. There are certain liabilities which the widow assumes upon taking possession of the land set off to her for her dower. Thus, in the State of New York, the statute provides that she takes the land subject to the payment of all taxes and charges accruing thereon subsequent to her taking possession. (2 *R. S., part 3, ch. 8, tit. 7, § 18.*) And most likely the widow is liable, in all of the states, for the taxes laid upon the estate after she takes possession; although she is not liable, usually, for the taxes on the part not assigned to her. Thus, under the New York statute, it has been held that, when certain apartments in a house are assigned to the widow, and the residue are in the possession of the heir or his grantor, a tax, or an assessment or water-rate upon the house and lot, is to be paid by contribution; and that if either pay the whole, the equitable share of the other may be recovered back. (*Graham v. Dunigan*, 2 *Bosw. R.*, 516.)

Where the heir has redeemed the land by paying off a mortgage, and the widow files her bill against him for dower, she must contribute, by paying to the heir during her life, an annuity of one-third of the interest on the amount paid by him, to be computed from the time of such payment, or the value of such annuity, according to the circumstances. (*Swaine v. Perine*, 5 *Johns. Ch. R.* 482.) So also, the widow must bear the interest, at seven per cent, of one-third of assessments on the land in which she

is entitled to dower, to commence from the time the assessments became a charge, provided this was subsequent to the death of her husband; and if not, then from his death. (*Williams v. Cox*, 3 *Edward's Chancery R.* 178.) And it has been held that one who is the owner in fee and in possession of real estate, subject to the right of dower of a widow therein, may maintain an action against the widow for an adjustment and apportionment of the taxes and assessments which are a lien upon the premises, and for a decree directing the widow to pay her proportion of such taxes and assessments, and that such action may be maintained in equity, under the old system of practice, or under the act of the New York legislature, passed in 1855, providing for the due apportionment of taxes and assessments, and for the sale of real estate to pay the same. (*Linden v. Graham*, 34 *Barb. R.* 316.)

§ 450. The duties or services to which the widow is liable in respect of her dower, are founded upon her title to the estate. Her interest, as has been before asserted, is a continuation of her husband's seisin, and consequently she is liable, as standing in his place, to one-third of all the duties and services to which the estate was subject in his possession, and for which one-third she is answerable to the person entitled to the reversion of the property. (*Ascough's case*, 9 *Coke's R.* 135. 9 *Viner's Abridgment*, 268, *pl.* 5, 6, 7, 8.)

Upon the principle applicable to these cases, if the estate be subject to a mortgage for a term of years granted before the husband became entitled to it, his widow will be obliged to keep down one-third of the interest. (*Vide Jones v. Griffith*, 2 *Coll. N. C.* 207.)

The liability of the widow to contribution for part of the duties reserved out of the dowable estate, is founded on justice; on the principle that the owner of two-thirds of the estate should not be obliged to pay over the whole of such reservation, but that the proprietor of the other third should contribute *pro rata*.

It is also equal justice, that if the heir or his grantor become discharged of the render or duty, it should operate in favor of the widow. Accordingly, if the husband's estate, upon its creation, were subject to a rent, and the reversion or dower of the estate, or if the person to whom it is payable release the whole or part

of it to the heir, the widow will also hold her dower discharged from it, a third of which she was previously liable to pay to the heir. (*Coke's Littleton*, 241. 1 *Bright's Husband and Wife*, 395, 396.)*

CHAPTER XXXI.

THE STATUTORY PECULIARITIES OF THE SEVERAL STATES WITH RESPECT TO HUSBAND AND WIFE, AND THE RIGHTS OF MARRIED WOMEN—THE LAWS OF NEW YORK—THE ACT FOR THE PROTECTION OF THE PROPERTY OF MARRIED WOMEN—RIGHTS AND LIABILITIES OF HUSBAND AND WIFE—PRESUMPTIONS IN FAVOR OF THE WIFE—THE HUSBAND'S TENANCY BY THE COURTESY.

§ 451. THE law with respect to husband and wife, and especially the law which defines the position and the rights of the *feme-covert*, has undergone a very great change in this country within the last few years. Some of the peculiarities of these local changes will now be referred to more fully than in the previous discussion; and it will be convenient to advert to the states in their order, beginning with the State of New York.

The first radical change which was made in the old rules respecting the property and rights of married women, in New York, was the passage of the act of 1848. This act has been amended from time to time by subsequent legislatures until the law has become tolerably well settled.

Previous to the year 1848 there was a strong sentiment that the wife was the victim of an oppressive legal system, from which she ought to be relieved. This was a prominent subject of debate in the constitutional convention which sat in 1846; and the substance of the subsequent act of 1848 was at one time incorporated into the project of the new constitution, but it was finally rejected by a

* It is not consistent with the design and plan of this treatise to pursue the discussion of the subject of dower further. Enough has probably been said to give the student a bird's-eye view of the entire subject, and to enable him to comprehend and master most cases which are met with in ordinary practice. Should the reader, however, desire to possess himself of the very great variety of learning to be found upon the subject, both ancient and modern, he is referred to Park on Dower, or to the elaborate work of Mr. Scribner, now just published, or some of the other standard treatises in which the subject is specially and exclusively treated.

close vote. (*Debates by Croswell and Sutton*, pp. 55, 116, 794, 795, 811-813.) The advocates for a reform as to the legal condition of married women then addressed themselves to the legislature, and the result, in the first instance, was the act of 1848, referred to.

As the law now stands, any married female may take by inheritance or by gift, grant, devise or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same is not subject to the disposal of her husband, nor liable for his debts. (*Laws of 1848*, ch. 200, § 3, as amended by the *Laws of 1849*, ch. 375. 4 *Stat. at Large*, 513, 514.) And by another act, the property, both real and personal, which any married woman owns as her sole and separate property, and that which comes to her by descent, devise, bequest, gift or grant, or which she acquires by her trade, business, labor, or services, carried on or performed on her sole or separate account; or which a woman married in this state owns at the time of her marriage, and the rents, issues and proceeds of all such property will, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and is not subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent. (*Laws of 1860*, ch. 90, § 1. 4 *Stat. at Large*, 515, 516.)

§ 452. By the statutes of the State of New York, a married woman may also bargain, sell, assign and transfer her personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services, are declared to be her sole and separate property, and may be used or invested by her in her own name. And any woman possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, with the like effect in all respects as if she were unmarried, and she may in like manner enter into any such covenant or covenants for title as are usual in conveyances of real estate, which covenants are declared obligatory to bind her separate property, in case the same or any of them be broken. (*Laws of 1860*, ch.

90, §§ 2, 3, as amended by *Laws of 1862, ch. 172*. 4 *Stat. at Large*, 516.) And it is further provided that no bargain or contract made by any married woman in respect to her sole and separate property, or any property which may come to her by descent, devise, bequest, purchase, or the gift or grant of any person, except her husband; and no bargain or contract entered into by any married woman in or about the carrying on of any trade or business, under any statute of the state, shall be binding upon her husband, or render him or his property in any way liable therefor. (*Laws of 1860, ch. 90, § 8, as amended by Laws of 1862, ch. 172*. 4 *Stat. at Large*, 516, 517.)

§ 453. It has been judicially declared that the statutes of 1848 and 1849, referred to, gave no power to the wife to dispose by will of property acquired by her before the passage of the acts, or of the interest accruing after the acts, upon money previously given to her, or of the proceeds of her own labor which her husband permitted her to receive, manage and invest in her own name, and as if it were her own property. It was admitted, however, that the language of the acts was broad enough to embrace all property owned by the wife at the time of the marriage, or acquired by her by gift, devise or otherwise during coverture and before the passage of the act, excluding any title or right which the husband had acquired in it by pre-existing laws, saving only the rights of creditors. In short, that the effect of the statute was to take away from the husband all right to the personal estate and choses in action of the wife acquired by virtue of the marital relation; but it was held that it was not competent for the legislature to enact a law thus affecting existing rights of property, and that the statute, so far as it related to such existing rights of property, was unconstitutional and void. (*Ryder v. Hulse*, 24 *N. Y. R.* 372, 375.) Indeed, the same doctrine had been held by the court of appeals eight years before, when it was decided that the husband had a vested interest in a legacy which was bequeathed to his wife prior to the act of 1848, although the legacy was not reduced to possession when that act took effect, and therefore the legislature had not power to deprive the husband of his rights to such a legacy, and make it the sole and separate property of the wife; and that so far as the act purports to do so, it violates the provision of the constitution of the state, declaring that no person shall be deprived of "property without due process of law." (*Westervelt v. Gregg*, 12

N. Y. R. 202.) Similar decisions have also been made by the supreme court of the state, and the doctrine settled by them is important, not only as determining the rights of parties under the act, but also as an index by which to decide with respect to other acts of the legislature. But it seems that the statute, so far as it provides that all future property descending to the wife shall be transmitted to her, to her sole and separate use, and that she shall hold the rents, issues and profits thereof in the same manner, and with the like effect as if she were unmarried, was in effect a modification of the laws of inheritance entirely within the control and direction of the legislature. (*Sleight v. Read*, 18 *Barb. R.* 159.) And the married woman's acts of 1848 and 1849 are not liable to objection, as impairing the obligation of a contract, because they defeat the expectation which the father of a living child had, previous to those acts; of being tenant in curtesy in lands acquired by his wife during coverture and subsequent to those acts. (*Stevenson v. Townsend*, 22 *N. Y. R.* 517.)

§ 454. It has been deliberately held in at least two cases in the court of appeals, that the common law disability of a husband to take land by conveyance from his wife, is not removed by the statute of 1849, enabling the wife "to convey and devise real and personal property, as if she were unmarried;" and therefore it was decided that a deed executed by a wife, in contemplation of death, in good faith and voluntarily, was wholly ineffectual. The learned judge who delivered the opinion of the court said: "No doubt there was an intention to confer upon the wife the legal capacity of a *feme-sole*, in respect to conveyances of her property, but this does not prove that she can convey to her husband, for no such question could possibly arise in respect to a *feme-sole*, there being no person to whom, in respect to conveyances as made by her, the rule of the common law could apply. By assimilating the case of a wife to that of an unmarried woman, the legislature merely meant to say that she should have the same power as though she was not under the disability of coverture. Taking away that disability, she would have power to make all such conveyances as were not forbidden by special provisions of law; but such general statutes are never understood to overreach particular prohibitions, founded on special reasons of policy or convenience. Corporations cannot in general take title to lands by will. The removing of the disabilities of *femes-covert* would not allow them to make a devise

to a corporation not authorized to take. It is not the disability of the wife alone which would, by the common law, render void her conveyance to her husband. The husband is as much disabled to take under such a conveyance as she was to convey. Therefore, to render the conveyance valid, the husband's disability, as well as that of the wife, must be removed; but as has been remarked, there is no language in these acts, and nothing in their apparent intention, which looks to the removal of any disabilities under which he labored." The decision of the court was not unanimous, but was pronounced in accordance with the opinion read; and it was further held in the case, that the defective conveyance could not be aided by the application of equitable principles. (*White v. Wager*, 25 *N. Y. R.* 328, 333, 334. *S. C.* 31 *Barb.* 250.) As was intimated, one of the judges dissented from the determination in the case of *White v. Wager*; but a case was subsequently decided by the court in which all of the judges agreed, that the disability of the husband to take land by conveyance from the wife remains as before the statute of 1849, although it was said that such a deed might be established by the application of principles of equity when a consideration has been paid, and also when the grantee is entitled to equitable relief for improvements made upon the premises in good faith, to the extent of such equitable claim. (*Winans v. Peebles*, 32 *N. Y. R.* 423. *Vide also Savage v. O'Neil*, 42 *Barb. R.* 374.)

§ 455. It seems that it was the purpose of the legislature, by the married woman's acts of 1848 and 1849, to confer new rights of property upon the wife, separate from and independent of her husband, and to enlarge and render more fixed and certain those already existing. Long anterior to those acts, the right of the wife to the ownership of property, both real and personal, distinct and independent of her husband, was thoroughly recognized and enforced by the courts. But the legislature thought proper to enlarge the rights of the wife in this respect, and make them more certain and stable, and with that view the enabling acts were passed. As the statute law now stands, a married woman may acquire the title to personal property, as well as real, by grant or purchase; and this purchase may be made in any of the ordinary modes known to the law or to the course of business. It may be made by the payment of cash for the property purchased, and if this cash be the property of the female, and paid with the intent

to vest the title to the goods in her, she undoubtedly acquires thereby a perfect and indisputable title to the property. So the purchase may be *on credit*—on *her* credit; and if there be no doubt that the purchase was made by her; that the credit was given to her; that the object was to vest the title in her, and that all this was well known both to the seller and the purchaser, there can be no possible doubt that she acquires title thereby to the property in her own name, and as her sole and separate property. So the purchase may be made by herself in person, or by her authorized agent. There is nothing in the statute or in principle, which when her right to act as a *feme-sole* is recognized, forbids her employment of an agent, any more than it forbids the employment of such agent by any other person. So long as the transaction is thus understood by the vendor and by the vendee and by the agent, this conclusion is irresistible. And there would seem to be no good and legal reason why she may not employ or at least use her husband as her agent to make such purchase, provided it be done honestly and in good faith. For the purpose of such a purchase she is regarded as a *feme-sole*, and as a person distinct from and independent of her husband, and he stands in the same relation to her. It is immaterial who such agent may be, provided he be a person of sufficient intelligence and competence to make a valid contract. The act of agency may be performed for compensation express or implied, or it may be gratuitous, and in either case it is valid. If gratuitous, it cannot interpose any obstacle to the passage of the title from the vendor to the intended vendee. If worthy of compensation it may create an obligation to pay a *quantum meruit* to the husband of which his creditors may avail themselves, but it cannot prevent the transfer of the title to her. If agreed to be for compensation between the husband and wife, such agreement is either void or valid. If void, it does not destroy the agency nor affect the title to the property; but only the title to the compensation. If valid, and the better opinion inclines in that direction, it entitles the husband to that compensation. If not paid at the time, there may be a technical difficulty in the way of the husband's bringing a suit to recover it directly against his wife. If there is, that cannot destroy the wife's title to the property. The husband may receive the amount of it out of the wife's funds which come into his hands; or he may transfer the right of action to a third person; or his creditors may obtain

the benefit of it by action. But it cannot operate to bar the wife's acquisition of title. Of course, if the transaction be a mere cover, if the object be to use the wife's name to cover the husband's property, parties are at liberty to show the facts, and thus to nullify the transaction.

But the act of 1860 is more comprehensive than those which preceded it. The first section recognizes the various sources of title by descent, devise, bequest, gift, grant, and also such as she acquires by her trade, business, labor or services carried on or performed on her sole or separate account, and confirms that title in stronger terms than those used in the previous acts.

The second section authorizes her to bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services, on her sole and separate account, and declares the earnings thus made to be her sole and separate property, which may be used or invested by her in her own name.

By the provisions of the act of 1860, as amended by the act of 1862, the married woman's right to acquire and dispose of property, and to make bargains and contracts in relation to it, in almost any mode known to the law or to the practice of the commercial community, would seem to be recognized. In carrying on her trade or business, while it is done in her own name or for her own benefit, it may, like all other trades and business, be carried on by herself personally, or through the instrumentality of others. There is no greater disability imposed upon her than upon any *feme-sole*, and there is no reason or principle why there should be. So, also, in this business, as in the purchase of property, she may employ her husband as her agent. For the purpose of the business she is a *feme-sole*, and he is a *man-sole*. He may act for her like another person, and whether he is entitled to his compensation, and, if so, how he is to obtain it, seems not necessarily involved in the issue. The law gives a married woman a right to purchase personal property; to purchase it for cash; to purchase it on credit; to purchase it personally; to purchase it through the medium of an agent; to do it through the agency of a third person; to do it through the agency of her husband. If the purchase be fair, the intent made known, the agency disclosed, and the transaction honest, her title to the property is unquestioned—is indisputable.

She may intend to employ the property thus purchased in trade, and in trade for the benefit of her husband, by the fraudulent use of her own name; until she does so, the property is hers, and intangible by his creditors. She may carry on the trade or business of a merchant; she has a right to do so; she may carry it on with the property and means to which she has thus fairly acquired title. She may carry it on herself by her personal labor and services, exclusively, or exclusively through the medium of agents, or partly in each mode; and it is lawful. She may make her husband her agent, and if she does it *bona fide*, without permitting her name to be used as a cover for fraud, if she carries it on for her own benefit, employing him fairly as her agent, and willing and intending to compensate him, or through him his creditors, and not to absorb the proceeds of his labor and earnings in her business for her own benefit, excluding his creditors therefrom, the transaction is lawful and will be upheld by the law.

Such is the judicial reasoning in a case where the creditors of the husband sought to satisfy an execution out of property employed in business carried on in the name of the wife, by her husband, nominally as her agent; and there are principles enunciated in the discussion which are very interesting and important, and which may apply to cases constantly arising as the law now stands. (*Abbey v. Deyo*, 44 *Barb. R.* 374, 378-384. *But vide Coon v. Brook*, 21 *ib.* 546; *Woodbeck v. Havens*, 42 *ib.* 66; and *Rose v. Bell*, 38 *ib.* 25.)

§ 456. It has likewise been determined by the court of appeals, that the acts for the more effectual protection of the property of married women demand a liberal construction to carry into effect the beneficent intent of the legislature; and it was affirmed that the design was not to render the property of the wife inalienable during coverture, but to secure to her the beneficial use of it. In respect to property owned by her at the time of the marriage, it relieved her from the common law disabilities incident to coverture, and continued to her her rights as if she had remained sole. The property continued "her sole and separate property;" that is, her property absolutely and with all the incidents of property, and as "if she was a single woman." Property, considered as an exclusive right to things, contains not only a right to use them but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without

consideration, or even throwing them away. The property continues in her without qualification, and with all the rights which a *feme-sole* or other person not under disability could take or enjoy in respect to it. The statute gives the wife the property, and she takes it with all the incidents of ownership absolute and unqualified. Upon this reasoning it was decided that a wife, by allowing her chattels belonging to her, and which remain *in specie*, to be employed by her husband in the carrying on of a business for their common benefit, does not devote them to her husband so as to render them liable for his debts. (*Sherman v. Elder*, 24 N. Y. R. 381. *Vide also Van Ellen v. Carrier*, 29 Barb. R. 644.)

§ 457. The object of the married woman's acts of 1848 and 1849 was to divest the title of the husband *jure mariti* during coverture, and to enable the wife to take the absolute title, as though she were unmarried. Before the act of 1860 there was some difficulty in a married woman purchasing property, whether real or personal, on credit, arising out of the principle that she could not make a contract for payment which would be binding upon her personally, according to the general rules of law; but if the vendor would run the risk of being able to obtain payment of the consideration of the sale, it has been held that the transfer would be valid, and no estate would pass to the husband, whether the wife had antecedently any separate estate or not. Upon this principle a demise to a married woman, by a person other than her husband, of a term for years in land, by a lease reserving rent, but containing no covenant or agreement on her part for its payment, was sustained as a valid grant, by which she might take and hold the premises to her sole and separate use. (*Darby v. Callaghan*, 16 N. Y. R. 71. *Vide also Fox v. Duff*, 1 Daly's R. 196.) And, upon the same principle, it was held by the court of appeals that, after the statutes of 1848 and 1849, and independently of the act of 1860, a married woman might acquire the title to real or personal property by buying the same upon credit, and that no interest therein would pass to her husband, whether she had antecedently any separate estate or not. If the vendor would take the risk of payment, the transfer was perfect; and, having thus obtained the property, she could manage it by the agency of her husband or any other, and hold the profits and increase to her separate use. (*Knapp v. Smith*, 27 N. Y. R. 277.) And, upon the authority of the case of *Knapp v. Smith*, the supreme court held that, under the acts of 1848 and

1849, a married woman has capacity, notwithstanding her coverture, and irrespective of the act of 1860, authorizing a *feme-covert* to carry on a trade or business, and protecting her earnings, to purchase a stock in trade, business and good will, by executing a mortgage on her own separate real estate, and to recover for work, labor and services done and performed, and materials furnished by her in the course of such business. (*James v. Taylor*, 43 Barb. R. 530, 532.) The court of appeals, however, in September, 1866, held that, prior to the statute of 1860, a married woman could not render herself personally liable for the payment of rent, since the enabling acts of 1848 and 1849 did not abrogate the general rule of law that a *feme-covert* cannot bind herself personally by contract for payment; but the proposition was re-affirmed, that if the lessor will assume the risk of being able to obtain payment of the rent, the lease will be valid, and no estate will pass to the husband. (*Draper v. Stouvenel*, 35 N. Y. R. 507. And vide *Goulding v. Davidson*, 26 ib. 604.)

§ 458. The married woman's acts of 1848 and 1849 have been declared by the supreme court to be remedial statutes, intended to remedy and remove a disability which was thought to be unwise, unjust and a reproach to the civilization of the age. These statutes must, therefore, have a liberal and beneficent interpretation, so as to give effect to the intention of the legislature, notwithstanding some of the results may seem to proceed beyond the letter of the acts. The manifest intention was to enable married women to take, hold, and use and enjoy real and personal property obtained in the way prescribed in the statute, and also to grant, devise and convey the same, to the same extent and with the like effect as if they were sole and unmarried. Incidental to the right of property and the power of disposition, is the power to improve it and increase its value, and a like incident to the use of real property, is the right to the increased value, whether it proceeds from improvements put upon it by the owner or from a rise in value. Neither of these elements of value can be separated from the property in its original and primary condition, and become an integral part of the property itself. A married woman who borrows money upon the credit of her separate estate, makes valuable improvements upon it, and thus enhances its value beyond the cost of the expenditure, does not derive the enhanced value by any of the ways mentioned in the statute, but takes it as an incident and as a part of the property itself.

Such improvement and enhanced value may and would be deemed to be the fruits and results of her skill and labor, but no one would probably think it should inure to the benefit of her husband and his creditors, for the very obvious reason that the improvements are blended with, and have become a part of, the property itself, and no new property has been created or acquired. The value or the equivalent in money has been enlarged, but the lands, the property, is still the same. Upon this reasoning the court decided, that when the wife purchased real estate, and borrowed money and built upon it, and by her skill and good fortune greatly enhanced its value, the whole belonged to her, and did not constitute property to which her husband or his creditors could have any legal or equitable rights. (*Goss v. Cahill*, 42 Barb. R. 310, 315.)

But the same court held, however, that when a married woman, receiving a sum of money as a preferred creditor, under the assignment of her husband, embarks it in trade, in a business under the control of her husband, and carried on by him in his own name, as "agent," commingling it with the avails of his labor, she deprives herself of the shield provided by the acts of 1848 and 1849, "for the more effectual protection of the property of married women," and subjects it to the claims of her husband's creditors. (*Buckley v. Wells*, 32 Barb. R. 569. But vide *Abbey v. Deyo*, 44 ib. 374.) And the court had previously held that a wife may confer upon her husband the use or income of her separate property as a gift, and that her acquiescence, or assent to its receipt or use by him, is evidence of a gift by her. Therefore, when a married woman, owning a farm, in her own right, goes into the possession of it with her husband, and occupies it with him and their family; she permitting him to cultivate the land, but without any agreement as to the rents or produce, and to use the proceeds in the support of herself and family, and to sell, exchange and deal with the crops at his pleasure; it is decided that she thereby confers on him rights which cannot be withdrawn or repudiated when his creditors seek to collect their demands out of property for which he has exchanged the produce of the farm; but that at law and in equity property thus purchased by the husband belongs to him, and may be seized by his creditors. (*Gage v. Dauchy*, 28 Barb. R. 622. And vide *Van Sickle v. Van Sickle*, 8 How. Pr. R. 265.) But the court of appeals reversed the judgment in *Buckley v. Wells* (*supra*), laying down the rule, that, as the law now stands, a married woman may

manage her separate property through the agency of her husband, without subjecting it to the claims of his creditors; holding also that the wife is entitled to the profits of a mercantile business, conducted by the husband in her name, when the capital is furnished by her, and he has no interest but that of mere agent; and, further, that the application of an indefinite portion of the income to the support of the husband does not impair the title of the wife to her property; and that no interest in her separate estate is acquired by the husband or his creditors through his voluntary services as her managing agent. (*Buckley v. Wells*, 33 *N. Y. R.* 518.)

§ 459. It has been held by the supreme court, that the power conferred upon married women to *devise* real and personal estate, by the act of April 11, 1849, amending the act of April 7, 1848, for the more effectual protection of the property of married women, was not repealed by the act of March 20, 1860, concerning the rights and liabilities of husband and wife. (*Wallace v. Bassett*, 41 *Barb. R.* 92.) And the court of appeals have held that where a married woman, possessed of a separate personal estate, dies without having made any disposition of it in her life-time, or by way of testamentary appointment, the title thereto vests in her surviving husband, and cannot be affected by the granting of administration upon her estate to any other person; declaring that the statutes of 1848 and 1849, do not change the rule at common law in this respect, but affect only such property as she disposes of in her life-time or by will. (*Ransom v. Nichols*, 22 *N. Y. R.* 110.) The separate estate of a married woman, in real property owned by her since the acts of 1848 and 1849 in relation to married women, is none the less a *separate* estate because it is a *legal* instead of an *equitable* estate; and the only difference between the separate estate of a married woman, as previously recognized and acted upon by courts of equity, and their title to property acquired or held under those acts, is, that the former is an equitable and the latter a legal estate or title. (*Colvin v. Currier*, 22 *Barbour's R.* 371.)

A trust for the benefit of an unmarried female, accompanied by a limitation of the income of the trust property to her sole and separate use, for life, free from the control or interference of any future husband, created prior to the acts of 1848 and 1849, will prevent a husband whom she may marry subsequent to those acts,

from acquiring by the marriage, any vested rights in the wife's lifetime, in or to her *savings from her income*, and those acts give to the wife the power to dispose of such savings by will. But, as has been before shown in principle, if she dies without having disposed of such savings, or of the property arising therefrom, by will or otherwise, her husband, on her death, will be entitled, in his marital right, to such savings or property. (*Rieben v. White*, 43 Barb. R. 92. S. C. 28 How. Pr. R. 320.)

§ 460. Since the married women's acts of 1848 and 1849, when the wife is in possession of property under claim of ownership, her right as owner cannot be overlooked without evidence, any more readily than if she was unmarried. The statute has worked this change, and instead of an adverse presumption that the property connected with a business which she carried on as a single woman, with the property in her possession, belonged to the husband, the presumption is now in her favor, and must be overcome by the party who disputes her right or title. The fact of coverture has ceased to have any relation to the technical right of a married woman to maintain an action in respect to her separate property; and the allegation of coverture in the complaint is no longer necessary. (*Peters v. Fowler*, 41 Barb. R. 467.)

Under the provisions of the acts of 1848 and 1849, a married woman, having a separate legal estate consisting of money, may lend the same, take and hold securities therefor in her own name, and sue for and enforce them at law, and the power to do these things includes the ability to make all contracts incident thereto; and she is not exempt from the liabilities which the law imposes upon all other lenders of money. It was held, therefore, that an action may be maintained by a borrower against husband and wife jointly, to recover back money paid as usurious interest, where the money loaned and the security taken therefor belonged exclusively to the wife, as a part of her legal estate, and the money taken for the loan and forbearance was paid to and received by her, and the husband, so far as he participated in the transaction, acted for her and with her knowledge and assent. (*Porter v. Mount*, 41 Barb. R. 561. But vide S. C. 45 ib. 422.)

§ 461. The acts of 1848 and 1849 were not intended to enable married women to take and hold property *jointly* with their husbands, but to take and hold and dispose of property as if they had no husbands. It was determined, therefore, that when a lease for

a term of years is executed to husband and wife jointly, the rights and interests of the lessees, respectively, by and under the lease, and in and over the demised premises, are what they are declared to be by the common law, and are unaffected by those acts. If such a lease were executed to the wife alone, the term or leasehold interest, under the protection of the statute, might be held by her to her sole and separate use, free from the control, disposition or debts of her husband; though previous to the statute of 1860, her covenant to pay the rent reserved in such lease, would have been absolutely void at law, and it is not certain that the execution of such a covenant would have been held in *equity* sufficient evidence of an intention on her part to charge real estate of hers, held by her at the time to her separate use, with the payment of the rent. But clearly, when the lease is executed to the husband and wife *jointly*, the payment of the rent reserved by the lease cannot be enforced against the wife, and the interest of the lessees may be made subject to the debts of the husband. (*Goelet v. Gori*, 31 *Barb. R.* 314.)

§ 462. Whether the acts of 1848 and 1849 entirely abrogate the existence of prospective tenancy by the curtesy, is a question about which there has been considerable doubt, and the decisions have been both ways upon the subject. It was held by the supreme court, at special term, at an early day, that the act of 1848, as amended by the act of 1849, in no way changed the law of descent and that real estate, by the law of descent, is cast the same as if the law had never been passed. It was admitted that the statute cuts off most emphatically all that freehold estate which the husband acquires *jure uxoris* during coverture, and which is a freehold estate during the joint lives of the husband and wife; and that the husband has now no interest in his wife's lands during coverture which he can use or transfer, or which his creditors can in any manner reach. But it was affirmed that the estate is vested in the wife during coverture, and upon her death descends to her heirs, charged with the incumbrance of the husband's rights as tenant by the curtesy, if there has been a child born alive of the marriage; and this view was sustained by a learned and elaborate opinion of the court. (*Hurd v. Cass*, 9 *Barb. R.* 366, 370.) This doctrine was concurred in several years later by another judge sitting at special term, who held that if a married woman, seised of real estate which accrued to her during coverture, does not avail herself

of the right given by the statute, to *convey* or *devise* the same, her husband will, upon her decease, become tenant by the curtesy whenever he would have been such tenant prior to the act of April, 1848. (*Clark v. Clark*, 24 Barb. R. 581.)

On the contrary it has been held by the supreme court at general term, upon mature deliberation, that the acts of 1848 and 1849 entirely abrogate the existence of the prospective tenancy by the curtesy, and that every quality and incident that is necessary to constitute a tenancy by the curtesy is destroyed by the provisions of these acts. The judge who decided the case at special term delivered the opinion of the court at general term, and after examining a large number of authorities, including those of *Hurd v. Cass* (9 Barb. R. 366), and *Clark v. Clark* (*supra*), said: "These statutes execute their own purpose. Trustees are dispensed with, and husbands excluded. The machinery is simple, the intent clear. From the influences of such considerations, I held before, and, seeing no reason to change those views, I hold now, that our natural progress in knowledge and intelligence, our advanced social and political condition, our changed system of government, our better appreciation of equal and natural rights of every class and condition of citizens, presented a reason, and I thought, and still think, a *necessity*, for the passage of an act for the eradication of this unnatural and worse than useless tenure called curtesy, as one of the vestiges of a by-gone military age, which had too long remained an excrescence upon our system of law, based, as we claim it to be, upon the theory of an equality of natural rights. In my judgment the provisions of these statutes of 1848 and 1849 were aptly fitted, and were intended, to effect a radical change in relation to these tenures; that they introduced changes more suited to the necessities of the times, and to the present condition of parties; and that such a change was demanded by the highest considerations of public policy, was dictated by the soundest views of justice, and rested on a substantial basis of good sense. * * * I cannot hold that a *remedial* statute whose letter and title declare its design to be protection of the estates of *married women*, shall, by construction not warranted by its language, be made to protect the *husband*, and to give to the latter an estate which all elementary writers declare that they have neither a natural nor a moral right to hold." (*Billings v. Baker*, 28 Barb. R. 343, 370, 371, 378.) This case was very fully considered at general term, and, although

one of the four judges dissented, it must be regarded as settling the question that tenancy by the curtesy no longer exists in the State of New York, unless the authority shall be overruled by the court of appeals.

CHAPTER XXXII.

THE STATUTORY POLICY OF NEW YORK RESPECTING HUSBAND AND WIFE—DECISIONS UNDER THE PRESENT STATUTES—CONTROL OF MARRIED WOMEN OVER THEIR OWN PROPERTY—EFFECT OF THE MARRIAGE OF THE PARTIES TO. A BOND OR PROMISSORY NOTE UNDER EXISTING STATUTES—LIABILITIES OF MARRIED WOMEN UNDER THE STATUTE—CONSENT OF HUSBAND TO HIS WIFE'S CONVEYANCE—ACTIONS BY AND AGAINST MARRIED WOMEN—CHARGES AGAINST HER SEPARATE ESTATE—ACTIONS BY HER AGAINST HER HUSBAND—TRUSTEES OF MARRIED WOMEN—INSURANCE OF HUSBAND'S LIFE BY WIFE—SUMMARY.

§ 463. THE marriage of a female mortgagee with the mortgagor, since the act of 1848 for the protection of the rights of married women, does not extinguish her right of action upon the mortgage; and when such mortgagee unites with her husband in a junior mortgage of the same land, the act affects only her inchoate dower interest, but does not in the absence of words for that purpose impair her right to priority of lien. In the State of New York, the Code and the acts of 1848 and 1849 have completely swept away the common law rule which gave the husband rights in, and control over, the property of the wife. Now every female, in respect to property owned by her at the time of marriage, continues its owner after marriage, with full power to use, control or dispose of it in every particular, the same as if she had remained unmarried. Marriage no longer operates upon the property, but only upon the person; by it the estate of the female is no longer transferred to the husband, nor the right to use or control it. The statutes declare "that the property of any female who shall thereafter marry, and which she shall own at the time of marriage, shall continue her sole and separate estate, as if she were a single woman." This language is clear and explicit; it leaves no room for doubt or construction, and should receive at the hands of the court a faithful and fair construction. To hold that the marriage of the mortgagor with the

mortgagee released the debt, would be to nullify the express language of the act. These statutes are inconsistent with the common law, and, as both cannot stand, the latter must yield. The reason for the common law rule, viz., the unity of burdens which disabled the wife from suing the husband, has also been repealed. (*Code*, § 114.) The wife has been admitted to separate rights of action as well as of property. Now a wife may maintain an action in her own name, concerning her separate estate, against her husband or any other person. This was the reasoning of one of the judges who gave opinions in the court of appeals in a case involving the question, and the other two judges who wrote opinions concurred in the decision that the mortgagee was within the protection of the statute. If the bond and mortgage in question had been given by some third person, it was conceded that the rights of the wife would not have been affected by her subsequent marriage. But the statute makes no distinction in favor of a husband who is himself the debtor of the wife, antecedently to the marriage; and it was suggested that the bond and mortgage in the case were the property of the wife, which she owned at "the time of her marriage," and, by the letter of the act, they were to continue her "sole and separate property as if she were a single female," and that there is manifestly nothing in the language or in the general policy of the statute which will justify a discrimination in favor of the husband. (*Power v. Lester*, 23 *N. Y. R.* 527.) However, if an unmarried female makes a promissory note, and subsequently intermarries with the payee and holder of the note, the marriage operates to discharge the note and all liability thereon on the part of the maker. (*Curtis v. Brooks*, 37 *Barb. R.* 476.)

§ 464. Married women are authorized, under the acts of 1848 and 1849, to subscribe for and own stock in banks in their own right; and such stockholders are liable, under the act of 1849 (*Laws of 1849, ch. 226*), to the amount of the stock held by them in case default is made by the bank in the payment of any of its debts or liabilities. The legislature had the power to alter the common law, so as to make married women personally liable to the amount of their stock. It has thought proper to do so, and the courts are bound, as in all other cases, to enforce the liability. The liability is a statutory one, and extends to the *feme-covert*, but affects her property alone. What it may be worth to the creditors of the bank, or by what particular proceeding it is to be enforced

in a given case, are questions to be decided by reference to the statute. It is sufficient that the courts hold that a married woman, under the acts of 1848 and 1849, may hold stock in a bank, and holding such stock is within the act (*ch. 226 of 1849*) to enforce the liability of stockholders, and is liable as such to assessment for its debts. (*Matter of the Reciprocity Bank*, 29 Barb. R. 369. S. C. 22 N. Y. R. 9.) This is important simply as settling the principle that a *feme-covert* may subscribe for and hold stock in a corporate company, and, when she does hold such stock, she is subject to the same liabilities on account of it as other holders of stock in the same company. She cannot, in such cases, shield herself from the burdens that attach to a stockholder, on the plea of coverture.

§ 465. The act of 1860, concerning the rights and liabilities of husband and wife, relieves the wife from her disabilities as a *feme-covert*, and enables her to carry on her trade or business, and perform any labor and services on her sole and separate account. The power to carry on a trade or business includes the ability to make all contracts incident to such trade or business. And the same act, by exempting the husband from all liability upon or in respect to bargains or contracts made by the wife in or about the carrying on of her trade or business, recognizes the ability of the wife to make executory contracts which will be valid as against her, notwithstanding her coverture. (*Barton v. Burr*, 35 Barb. R. 78, 80.) The construction given in this case to the statute was fully assented to and indorsed by the New York common pleas, in a case in which it was determined, that when a married woman carries on the millinery business upon her own account, and purchases goods upon credit for such business on her own account, an action may be brought against her the same as if she were unmarried, and a judgment recovered, and the amount collected by execution out of property belonging to her in her own right. (*Klen v. Gibney*, 24 How. Pr. R. 31.)

A married woman may compromise a doubtful claim affecting her separate estate. So held in a case where a *feme-covert* agreed with the principal beneficiary under a will, to withdraw her opposition to the probate of such will upon consideration of the payment to her of a sum of money; it appearing that her separate estate would be increased by defeating the probate of such will. (*Palmer v. North*, 35 Barb. R. 282.)

§ 466. Where a married woman, on purchasing a farm as her separate estate, also purchased certain stock and farming implements thereon, and executed a mortgage of the chattels to secure the payment of the price thereof, to the vendor, the payment of which chattel mortgage was guaranteed by two other persons; the court held that the vendor, by accepting the chattel mortgage and guaranty, must be deemed to have trusted to the same as his security for the payment of the price; and that in the absence of any finding that the chattels were bought or the debt incurred for the benefit of the wife's separate estate, the same could not be charged with the payment. The court, however, laid down the proposition that a married woman not being able to make a contract valid at law, so as to bind herself personally, if she has a separate estate and contracts debts for her benefit, on the credit of it, it is just and right that a court of equity should enforce payment of the debts out of her separate estate. (*Ledliey v. Powers*, 39 Barb. R. 555.) The action in this case was brought upon a transaction which occurred long before the acts of 1860 and 1862; therefore, some of the reasoning of the court may not be applicable to a case arising under the last mentioned acts.

A married woman, having a separate estate in lands, but not in the rents and profits thereof, not conducting any business on her own account, cannot charge such separate estate by a parol promise to pay the debt of her husband, where the separate estate has received no benefit on account of the contracting of the debt, and will not be benefited by the payment of the debt. The judge, in giving his opinion holding this doctrine, said: "No promise of a man, orally made, will bind *his* real estate; why should not the oral promise of a woman have as much protection? The case of *Yale v. Dederer* (18 N. Y. R. 265, *same case*, in 22 *id.* 450), and the cases cited therein, I think, control this case. The defendant has neither made a separate instrument binding her separate estate to pay a debt *not* beneficial to her estate, nor has she created an equitable charge upon it by pledging payment from it as a debt which is beneficial. It is urged that the modern spirit of legislation evinces a desire and intent to give to married women more absolute control over their separate estates than formerly. This is doubtless true, so far as relates to their estates acquired in a certain way, after these acts took effect, and so far as such control will *protect* their estates; but what is claimed in this case would

hardly be a *protection* to them; on the contrary, it would open a door by which worthless, insolvent and spendthrift husbands, who perhaps exercise as much control over the minds, the fears and the apprehensions of their wives as better disposed husbands, could, and thus would, control their estates, and thus might *exhaust* the separate estates of their wives by *their* improvidence. The protection of the disability of coverture, therefore, is still the best protection for them in this respect. This disability has not been removed by this modern legislation; certainly not as to estates previously acquired." (*Ledlie v. Vrooman*, 41 *Barb. R.* 109, 113.) The doctrine of this case is simply that the wife cannot charge her separate estate by *parol* for the payment of the debts of her husband; but it cannot be denied that a married woman can charge the whole or a portion of her separate estate as a surety for her husband. The undertaking, however, must be in writing, and the intention to charge her separate estate must be expressed in the instrument, although it is not necessary to specify the property to be charged, unless the wife intends to charge only a specific portion of it. (*Bennett v. Lichtenstein*, 39 *Barb. R.* 194.)

§ 467. When a married woman by the terms of a *trust* created for her benefit under a will, is to have the income of a certain fund and real estate during her life, for her sole and separate use, free from the control or interference of any future husband whom she may marry, her *husband* has no *vested right* to or interest in the income, or her savings out of the income during her life, although the marriage took place previous to the acts of 1848 and 1849. By such marriage the husband acquired no vested rights which could not be interfered with or taken away by his wife's *will* under the statute. (*Rieben v. White*, 28 *How. Pr. R.* 320. *S. C.* 43 *Barb. R.* 92.)

A married woman, by accepting a deed of land subject to a mortgage, and covenanting to pay the mortgage, does not thereby charge herself, or any of her separate property, except the land conveyed, unless the deed and covenants are made in the course of a trade or business carried on by her. The act of 1860 gives her full power to bind herself in all proper matters concerning any business carried on by her for her own benefit, and on such contracts she is personally liable, but otherwise the common law disability still attaches to the wife. (*Brown v. Hermann* 14 *Abbott's Pr. R.* 394.)

When a promissory note is indorsed over and delivered to a married woman by the payee, the property in the note vests in her under the act of 1849. The note being thus indorsed to her, she acquires it in the form and mode prescribed by the statute for the acquisition of property by married women which they are to hold and enjoy as their separate estate. The possession of and property in the note, constitutes a separate estate of itself, and though she has no other estate, she may receive and hold such note. (*Dillaye v. Parks*, 31 *Barb. R.* 132.)

§ 468. By the provisions of the act of 1860 as it originally passed and existed, until the amendment of 1862, no conveyance or contract of the wife was valid without the assent in writing of her husband, or leave of the county court. (*Laws of 1860, ch. 90, §§ 3, 4, 5, 6.*) This provision, while it existed, was held not to apply to an act of the wife by which she merely created a charge or lien upon her property. Thus, her contract to pay a debt, charging the same upon her separate estate, did not need the assent of the husband or the order of the court to render it valid. (*Ward v. Servoss*, 15 *Abb. Pr. R.* 479.) These provisions of the act were amended or repealed by the act of 1862. (*Laws of 1862, ch. 172, §§ 1, 2.*) But until the amendment of 1862, they were in force, and no conveyance or contract executed by the wife during that period was valid, except in accordance with the act. (*Manchester v. Sahler*, 47 *Barb. R.* 155, 159. *Townsley v. Chapin*, 12 *Allen's R.* 476. *And vide Yale v. Dederer*, 22 *N. Y. R.* 450, 460.)

§ 469. Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may come to her by descent, devise, purchase, or the gift or grant of any person, in the same manner as if she were sole; and any married woman may bring and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole; and the money received upon the settlement of any such action or recovered upon a judgment is made her sole and separate property. And it is provided that in case it shall be necessary in the prosecution or defense of any action brought by or against a married woman, to enter into any bond or undertaking, such bond or undertaking may be executed by such married woman with the same effect in all respects as if she were sole, and in case the said bond or undertaking shall become broken or forfeited, the same

may be enforced against her separate estate. (*Laws of 1860, ch. 90, § 7, as amended by Laws of 1862, ch. 172, 4 Stat. at Large, 516.*) This statute has essentially changed the rights of the husband and wife in respect to torts committed upon the person or character of the wife, and has made her the sole plaintiff in actions brought for them, and given her the exclusive right to the damages and recovery therefor, and has taken from the husband all right to or control over the damages in actions brought for such injuries. Assaults and batteries and slanders are now made a part of the separate estate of the wife, and in respect to them she is as a *feme-sole*, and in actions to recover damages in such cases, the husband must not be joined with the wife as a co-plaintiff. (*Mann v. Marsh, 35 Barb. R. 68, 72.*)

§ 470. Under the statutes relating to married women as they now stand, the common law principle that a wife cannot take any gift from her husband, except through the intervention of a trustee, is abrogated. Therefore a married woman may maintain an action for the loss of any valuable thing given to her by her husband. The judge, in pronouncing the opinion of the court establishing this doctrine, said: "The act of 1848 merely provided that the property of any woman who should thereafter marry should be subject to the disposal of her husband or liable for his debts, and that the property of any woman thus married should be likewise exempted from the disposal of the husband, except so far as it may be liable for his debts theretofore contracted. In both cases it was declared that her property should be sole and separate, like that of a single woman, with the exception just mentioned. The act of 1849 extended this privilege by providing that any married woman may take by inheritance, grant, devise, or bequest, from any person *other than her husband*, and hold to her sole and separate use, and dispose of the property; and it was to be free from the disposal of her husband, and from the liability for his debts. The act of 1860 (*Laws of 1860, p. 157*) still further extends the privileges of married women; and in the seventh section it allows a married woman to sue and be sued in the same manner as a single woman in all matters relating to her property which she then possessed, or which may thereafter come to her by descent, devise, bequest, or the gift of any person, *except her husband*. We see that these several acts were all progressive, each successively increasing the privileges of married women with regard to prop-

erty; but they contain nothing which warrants the supposition that a husband could make a gift to his wife that he could not have made previous to 1848. The act of 1862 (*Laws of 1862, p. 373*), which is chiefly amendatory, amends the seventh section, to which I have referred, of the act of 1860, by omitting the words 'except her husband' after the word 'person,' so that she may sue and be sued in all matters having relation to any property obtained from her husband, as well as from any other person. When we consider the spirit by which this legislation was set in motion, and the progressive character of these several enactments, I think that we may safely infer that the legislature intended, by the act of 1862, to repeal the rule of the common law that a gift from a husband to a wife could not invest the property in her. This rule, indeed, is not repealed by express words, but the seventh section of the act of 1860, as amended by that of 1862, is inconsistent with it, and the common law rule may therefore be considered as impliedly repealed." (*Rawson v. The Pennsylvania Railroad Company, 2 Abb. Pr. R. [N. S.] 220, 222, 223. Vide also Scott v. Simes, 10 Bosw. R. 314.*)

§ 471. Under the statutes of 1848 and 1849, an *infant feme-covert* may execute a *deed of trust* of her real estate, and on arriving at majority may execute a deed of *revocation of the trust*, and thereupon convey by *deed absolutely* such real estate without joining her husband in either. Nor need her conveyance be *acknowledged* in the manner required by the Revised Statutes respecting acknowledgments of married women. It would seem, therefore, that under these statutes, a *deed of trust* by an *infant feme-covert* is unnecessary. The protection afforded by the law to the property of a married female is quite as effectual as it can be made by the contract of parties. The act for the *protection* of the property of married women has worked a complete radical change in the marital rights of husbands. Their old common law right to the personal, and the use of the real property is gone; and they have no estate or interest, or right whatever, absolute or contingent, except that upon the death of the wife, after issue born, without exercising the *jus disponendi*, he has, possibly, an estate for life as *tenant by the curtesy*. (*McIlvaine v. Kadel, 30 How. Pr. R. 193.*) Indeed, it is the opinion of some judges, as we have seen, that the acts "for the more effectual protection of the rights of married women," have entirely swept away the common

law right of the husband to his tenancy by the curtesy; but the better opinion is that the estate of a *tenant by the curtesy* has survived these acts; and when the wife omits to exercise her right of disposal of her property, real and personal, by deed or by will, those acts are not intended to interfere with the laws of descent—in respect to the *real estate*, or the laws giving the husband the right of succession to the personalty. (*Vide Jaycox v. Collins*, 26 *How. Pr. R.* 496. *Ransom v. Nichols*, 22 *N. Y. R.* 110.)

§ 472. In equity, there is no difference between the separate estate of a wife, created by operation of the statutes of 1848 and 1849, relating to married women, and a similar estate created by deed or any other instrument. It has been said that if it be considered that the effect of these statutes is to vest in her a legal title, whereas, before, when her interest was acquired by means of a settlement or deed, she had only an equitable estate, still, so long as her contracts are affected by the disability of coverture, the debts of the wife can only be enforced against her separate estate, however acquired, by a specific charge of such debts upon the separate estate, although the general legal disability to contract remains, as at common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under the statute, charge her estate for the purposes and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates. But this charge against her estate can only be enforced in a court of equity, upon the principle that the engagements of a married woman ought to be enforced against her separate property, not as the execution of a power, but as the exercise of a right of property to which is necessarily incident the power of contracting debts to be paid out of it. (*Vide Yale v. Dederer*, 18 *N. Y. R.* 265, 279. *Owens v. Dickinson*, 1 *Craig. and Phil. R.* 48.) The effect of this reasoning, however, has been considerably limited by the statute passed since the case of *Yale v. Dederer* was decided, which provides that a married woman may be sued in any of the courts in the State, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate in the same manner as if she were sole. (*Laws of 1862, ch. 172, § 7. 4 Stat. at Large, 517.*)

§ 473. When the wife conveys away a part of her real estate owned in her own right, and takes back, in part payment of the

consideration thereof, bonds and mortgages of her grantee, which she afterward sells and assigns by deed with a covenant of guaranty by herself and husband, that the money payable thereby is collectible; in an action on such covenant of guaranty against the husband and wife for breach of such covenant, in order to sustain the action and charge the unpaid balance upon the separate estate of the wife, it is incumbent upon the plaintiff to show, either that there was an intention to charge such estate in the contract of sale and guaranty by the wife, or that the consideration obtained upon the sale was for the direct benefit of her separate estate. (*White v. McNett*, 33 *N. Y. R.* 371.)

An action by a judgment creditor to reach real estate conveyed to the wife of his judgment debtor, a part of the consideration for such conveyance being paid by the judgment debtor, who is alleged to be insolvent, cannot be sustained, when the presumption of *fraud*, which attaches by reason of the payment of such consideration, is overcome by the evidence, and, therefore, in such a case, evidence tending to show that the debt to the plaintiff was contracted by a partner of the judgment debtor, of which the latter was ignorant at the time he paid the consideration money, and that the plaintiff made no claim against him personally till after the conveyance to his wife, was held by the supreme court to be properly admissible to show the want of a fraudulent intent on the part of the husband and wife. (*Ackerman v. Salmon*, 31 *How. Pr. R.* 259.)

When a married woman having a separate estate and transacting business on her own account, by her husband as her agent, employs attorneys to commence suits upon accounts growing out of the wife's business, the separate estate of the wife is liable for such services rendered by the attorneys as are found to have been for the benefit of the wife and her separate estate. If the suits and proceedings were instituted for the purpose of benefiting the wife's estate, the fact that they, or some of them, were unsuccessful, is not of controlling importance, on the question of the liability of her separate estate. The principle, in short, which now governs in cases of this kind is, that a wife's separate estate is liable to pay her debts during coverture, in whatever form they are incurred, not because her contracts have any validity at law, nor by way of appointment, or charge, but because equity decrees it to be just that they should be paid out of her estate. (*Owen v. Cawley*, 42 *Barb. R.* 105.)

§ 474. The statutes "for the more effectual protection of the rights of married women," of 1848 and 1849, were not intended to confer any greater authority upon them, to enter into contracts generally, than previously existed, and did not remove their legal incapacity to contract debts. Neither were the provisions of the act of 1860 intended to remove the common law disability of married women to bind themselves by their contracts at large. To be obligatory upon them under these statutes, the contract must relate entirely to their separate estate, or the trade and business in which they are engaged. The act of 1860 enables a married woman to carry on her trade and business, and to perform any labor or service, on her sole and separate account; but it does not extend her rights beyond the conduct of her business, so as to permit her to make contracts without regard to her trade or business, or her separate property. The act authorizes a *feme-covert* to carry on any trade or business upon her own account, but with this exception, the only contracts which it empowers her to make are those which have a direct reference to her separate property. (*Manchester v. Sahler*, 47 Barb. R. 155. *Vide also Yale v. Dederer*, 22 N. Y. R. 450, 462.)

Under the statutes as they now exist, a *feme-covert* cannot bind herself, or create a charge upon her separate estate, by a promise to pay for nursing and taking care of her sick and infirm father, when she does not agree or indicate an intention to bind her separate property. Nor is she liable in such a case, on the ground that under the statute (1 R. S. 614, § 1) she is bound to maintain her father, when it appears that she did not assume to pay for that reason and upon that consideration, and did not agree to bind her separate estate. (*Manchester v. Sahler*, *supra*.)

In common law actions the name of no person should be in or upon the record as a party except such as must have judgment pass for or against them. Married women now sue and are suable like unmarried women, and judgments are rendered for and against them, and enforced in the same manner as for or against other persons, under the statutes of 1860 and 1862. To reach the wife's separate property now, she must be sued alone; a judgment against both husband and wife is really a judgment against the husband at common law, and the execution in such judgment goes only against the property of the husband. (*Porter v. Mount*, 45 Barb. R. 422.)

§ 475. By the statute of 1860, a married woman has the right to keep a boarding-house on her own account, and consequently to employ servants to assist her in carrying on the business. It follows, therefore, that for any injury to her servant, *per quod servitium amisit*, a right of action accrues to her, equally as if she had been unmarried. This is a necessary incident to the right to carry on business on her own account, and to employ servants therein. And for such a cause of action a suit may doubtless be maintained in her own name, without joining her husband with her. Inasmuch as section two of the act of 1860 authorizes a married woman to carry on any trade or business on her own account, it must be conceded that when in section seven of the same act it provides that she may sue *in all matters having relation to her property*, it intended to authorize her to bring all actions necessary to protect her rights in carrying on such trade or business. The proceeds of her trade or business are specifically declared to be her separate property, and any wrongful interference with her business, either by enticing away her servants, or otherwise depriving her of their services, whereby the proceeds of her business are lessened, is a matter having relation to her property. Such must have been the intent of the law-makers in using that language; especially when considered in connection with the latter part of the section, which gives to a married woman the right to bring actions for injuries to their persons or characters. A construction of the language "all matters having relation to her property," which would exclude such a matter as this, it is thought, does not comport at all with the spirit and intent of the act. Upon this reasoning, it was held that when a husband has abandoned his wife and family, and resides in another state, the wife, owning a house, and being engaged in the business of keeping boarders, on her sole and separate account, may sue alone for the seduction of her daughter, over twenty-one years of age, who resides with her, and performs services for her about the house. The law gives the wife, thus situated, an action against any one who seduces and debauches her servant, if there is a loss of service shown. Such acts directly affect her legitimate business, which the law allows her to carry on, and have a direct relation to the earnings and fruits of her business, and therefore, indirectly if not directly, have relation to her separate property. (*Badgley v. Decker*, 44 Barb. R. 577.)

But a married woman cannot sue her husband in an action for assault and battery, or for damages arising from slander or libel. The right to sue her husband for such a cause may perhaps be covered under the literal language of the act of 1860, which declares that a married woman may bring actions to recover damages for injuries to their person or character, against *any person* or body corporate; but it is thought that such was not the meaning and intent of the legislature, and that such should not be the construction given to the act, for the reason:

1. It is contrary, not only to the rule of the common law, but to the spirit and intent of the married woman's acts the object of which was to add to her property rights as a *feme-sole*, and to distinguish her property from her husband's, and not to confer rights of action upon her, against him.

2. It is contrary to the policy of the law, and destructive of that conjugal union and tranquillity, which it has always been the object of the law to guard and protect.

3. The effect of giving so broad a construction to the act of 1860 might be to involve the husband and wife in perpetual controversy and litigation—to sow the seeds of perpetual domestic discord and broil—to produce the most discordant and conflicting interest of property between them, and to offer a bounty or temptation to the wife to seek encroachment upon her husband's property, which would not only be at war with domestic peace, but deprive her probably of those testamentary dispositions by the husband, in her favor, which he would otherwise be likely to make.

4. Under the acts of 1848 and 1849, which are quite comprehensive, the courts held that they did not remove the wife's common law disability to contract, otherwise than as respected her separate property. They therefore held her promissory notes, and executory contracts invalid, evincing a disposition not to enlarge the acts in question beyond their most plain and obvious scope, nor to remove the disabilities of the common law, to any greater extent than was required by the plain words of the statute.

5. The acts of 1860 and 1862 confer upon the wife the power to sue and be sued in rather broad terms, but not in a manner to lead to the implication that the husband was intended to be permitted to be sued by the wife for injuries to her person and character, as in an action of assault and battery, or slander. On the contrary, the provision of the act which declares that in actions brought or

defended by the wife, neither the husband or his property shall be liable for the costs thereof, gives strong color to the presumption that neither her bargains or contracts, or actions, which the law intended to authorize, were bargains, contracts or actions with her husband. (*Longendyke v. Longendyke*, 44 Barb. R. 366.)

§ 476. Whenever a husband has received or borrowed the property of his wife under circumstances which in a court of equity would be regarded as creating a debt to her, from him, and as entitling her to be considered and treated as his creditor therefor, he will be allowed to pay such debt from his property, in the same manner and upon the same principles on which he would be allowed to pay any other debt, to any other creditor; and a payment to her or a transfer of property to her in consideration of such debt, will not be regarded as a gift or a voluntary conveyance of property in fraud of his creditors. Upon this principle it was determined, that when the husband received from his wife's father a conveyance of a piece of land upon the express understanding that he might sell the land, and use the proceeds in his business, and that at some future time he should pay or secure to his wife, in her own right, the amount of such avails or proceeds, and the husband did accordingly sell the land and use the proceeds, and subsequently accounted and settled with his wife's agent in respect to such proceeds, and gave his promissory notes therefor, payable to such agent, and paid a part of the same, and *preferred* the balance in an assignment afterward made by him for the benefit of his creditors; such settlement and assignment having been found to have been made in good faith, and for the purpose of securing to the wife the avails of the land, according to the verbal agreement with her father, and without any intent to hinder, delay, or defraud creditors, the husband had a right in equity to make such settlement and assignment, and the same were valid as against his creditors. (*McCartney v. Welch*, 44 Barb. R. 271.)

So also where a husband, who was married prior to the married woman's acts of 1848 and 1849, was indebted to his wife in a certain sum for money arising from the sale of her separate real estate, which sum she had previous to those acts lent to him, he agreeing to keep it for her and treat it as her separate property, and repay it to her with interest, it was held by the supreme court, one of the three judges dissenting, that equity would hold the husband to be his wife's trustee for the amount, and allow him to

pay her the same, upon his becoming insolvent, in the same manner that he might pay any other creditor. But that to authorize him to prefer his wife as a creditor, it was necessary that the money in his hands should be held and regarded, as between them, at and from the time of its receipt by him, as a loan from her; and that they should have constantly and intentionally treated the sum in his hands as her separate property. And the doctrine was asserted that courts of equity regard husband and wife as distinct persons, and allow them to contract with each other as though they were unmarried persons. (*Woodworth v. Sweet*, 44 Barb. R. 468, 470, 271.)

§ 477. Under sections 274 and 287 of the Code of Procedure as amended in 1862, relative to actions against married women, it is only the cause of action against or liability of a married woman defendant, that is to be tried in the action against her. The determination of the mode of satisfying the amount recovered is postponed until the execution. The judgment thereby does not cease to be *in rem*, but becomes nominally *in personam*, only to be enforced against a particular kind of property. The amendments of the code referred to, do not do away with the necessity of alleging in the complaint and showing the liability of a married woman, for an act relating to her separate estate or trade, carried on by her under the act of 1860, or generally whatever was necessary to show her liability.

The amendments of 1862 leave undetermined several important questions: whether a married woman against whom a judgment has been obtained may be subjected to supplementary proceedings as regards her separate property; whether, on a judgment against a married woman for a tort, her separate estate may be levied on; whether she can give a confession of judgment, and whether a new action can be commenced on a judgment against her for any cause, so as to enable the plaintiff to make her separate property liable on execution; in other words, whether a married woman is to be considered in all respects as a *feme-sole* in regard to her liability and the judgment in an action against her, except as to the mode of enforcing such judgment.

In all cases of a judgment against a married woman, it should be expressly stated therein that the amount is "to be levied or collected out of her separate estate and not otherwise," and the execution should follow the judgment in its terms. A mere abso-

lute judgment *in personam* against a married woman, recovered prior to 1862, is not sufficient to entitle the creditor to sue thereon, and recover a judgment against her separate property. The creditor in such action on the judgment must also establish, at least, that the original cause of action was such as to entitle the plaintiff to a judgment against her separate estate. Otherwise the effect of the amendments of 1862 would be, to allow the plaintiff to reach property on the faith of which the original liability never was incurred, which could not then have been applied to its satisfaction, but which the legislature now by a species of confiscation is presumed to apply for that purpose, thus stripping every married woman in the state of her vested rights under any deed of trust in her favor—an intention not to be presumed, even if the act itself were constitutional. (*Baldwin v. Kimmel*, 1 *Robinson's R.* 109.)

The statute which has been before referred to, and which was in force when *Baldwin v. Kimmel* was decided, declares that “when a judgment shall be recovered against a married woman the same may be enforced by execution against her sole and separate estate *in the same manner as if she were sole.*” (*Laws of 1862, ch. 172, § 7.*) It would seem, therefore, that *any* judgment against a *feme-covert* may now be enforced by the ordinary execution against her separate property, irrespective of the cause for which it was entered. (*Vide Sexton v. Fleet*, 2 *Hilton's R.* 483. *Walker v. Swazy*, 3 *Abb. Pr. R.* 136.)

§ 478. Previous to the statute of 1860, a married woman could not purchase personal property in her own name, upon her own personal credit, and hold it for her own uses, unless she had a separate estate, and agreed or intended to charge it with the purchase price. Her services, talents and capacity for business and credit all belonged to her husband. A purchase made by a married woman under such circumstances, was regarded as a purchase by the husband, and he was liable to the vendor for the purchase price, provided the property came into his possession, or was used by his wife with his knowledge or consent. (*Glann v. Younglove*, 27 *Barb. R.* 480.)

So also previous to the statute of 1860, a married woman got no title to her own earnings in her own right, for services performed by her under an agreement that she should be paid therefor what her services were reasonably worth, and the agreement was made

with the knowledge of the husband, and without any objection on his part. In law the services of the wife belonged absolutely to her husband, and the promise to pay her was in law a promise to pay the husband and no one else. The common law controls the relation and rights of husband and wife, except where those rights have been modified or changed by statute, and there was no statute in the State of New York giving a married woman the right to perform labor or services on her sole and separate account, until March 20, 1860, before which her services and earnings belonged to her husband. (*Woodbeck v. Havens*, 42 Barb. R. 66.) But since the act of 1860, married women may carry on business on their own account, and purchase goods for and use them in their business, and they may bind themselves to pay for goods sold and delivered to them, and in default of payment according to agreement, they may be sued for the purchase price, and a recovery may be had against them, and such judgment may be collected. Whether the business of the *feme-covert* is profitable or not, or will benefit or waste her property, is immaterial. She has attained the dignity and possesses the capacity of every trader of an age to make a valid contract, and must pay for her purchases, or submit to a judgment if sued.

So, too, if she leases a store or other place for a business conducted by her on her separate account, and uses it for that purpose, she must pay the stipulated rent, whether the business be wise or foolish, or likely to be profitable or ruinous. When she buys on a representation that the goods are to be used in her separate business, or hires a store, representing that it is to be so used, a vendor or lessor, in a suit to recover the price of his goods or the rent due, must, however, allege that the one and the other were in fact actually used in her separate business; and if it should appear that she did not in fact use the goods purchased or the premises hired in carrying on her separate business, possibly that could be set up as a defense to the action. Probably it was not the design of the statute of 1860 to relieve entirely married women from the disability of marriage in making contracts, and to make all their contracts good; otherwise it would not have been so minute and exact in its provisions. Parties dealing with them were doubtless intended still to be required to use some caution in ascertaining that a contract entered into by them was necessary and proper for the carrying on of their trade or benefiting their estate. But

where the property is bought, or premises hired, for the purpose of being used in her separate business, and are actually so used, the wife must pay for the goods and for the use of the premises hired. (*Coster v. Isaacs*, 1 *Robertson's R.* 176.)

So, also, where a married woman hires premises in her own name, and pays the rent therefor, she has such an interest in the premises hired, under the present statutes of the state, as will enable her to maintain an action in her own name for trespasses committed upon the property. By virtue of such hiring and payment of rent, she is entitled to the possession of the premises hired, and her possession cannot be lawfully disturbed until the expiration of her term. (*Fox v. Duff*, 1 *Daly's R.* 196. *Vide also Darby v. Callaghan*, 16 *N. Y. R.* 71.)

§ 479. We have seen that a wife cannot sue her husband for an assault and battery (*ante*, § 475); and the court of common pleas of the city of New York has also decided that a married woman living apart from her husband cannot maintain an action of ejectment against her husband to remove him from premises belonging to her as her separate property and in his possession. The judge who delivered the prevailing opinion of the court said: "The literal construction of the act of 1862 would authorize any proceeding by a wife against her husband that she could initiate against any other person, and it may be that it was the intention of the legislature to grant her the right suggested. She is authorized by section two of the act of 1860 to carry on any trade or business, and perform any labor or services on her sole and separate account, and her earnings are secured to her as her sole and separate property. It may be that the legislature intended, by the act referred to, to authorize a married woman to abandon her husband, neglect her children, and, in disobedience to her husband, engage in any pursuit in which she chose to invest her separate estate or risk her credit. A literal reading of the statute would lead to no other conclusion, and if such was the intention of the legislature, it has inaugurated an element which strikes at the very foundation of conjugal happiness, and which must ultimately produce great mischief. I do not believe the legislature designed to establish any such authority. * * There is nothing in any of the acts mentioned which shows an intention on the part of the legislature so to invade the existing legal relation of husband and wife as to authorize the latter to commence an action of this

character against her husband, an action in form and by proof on the trial presenting no other feature than a title to the premises. * * * When a wife having a separate estate, of which she is unjustly deprived by her husband, wholly or partially, shall establish by proper proofs her right to its absolute possession, then she must be protected by the law, and her property restored. When she becomes an actor, it must be upon proper allegations and proof, and not upon the mere abstract doctrine of title. * * * She is not entitled, therefore, to the relief demanded upon the whole law of the land." (*Gould v. Gould*, 29 *How. Pr. R.* 441, 458, 459, 460.)

This case was regarded as an action of ejectment brought by the wife against her husband, from whom she had voluntarily separated; and it will be observed that the court decided simply that the action could not be maintained in the *form* in which it was brought. It was expressly or impliedly admitted that *facts* might exist which would entitle the wife to recover the possession of her property from her husband; but the impression seemed to be that she must bring her action in *equity*. Undoubtedly an action would be entertained in equity, brought by the wife directly against her husband, to restrain him from interfering with her separate estate, and to obtain the control of it; and it is difficult to conceive of any good reason why a wife should be turned out of court, and denied relief against her husband, merely because the *form* of her proceedings was legal instead of equitable. Since, by the present practice in New York, the functions of the courts of common law and the court of chancery are united in the same court, and the distinctions between an action at law and a suit in equity no longer exist, certainly the reasoning of the judge who pronounced the prevailing opinion in the case of *Gould v. Gould*, would be as pertinent in the one form of proceeding as the other. If there was any defect in the pleadings for want of proper averments, of course it was in the power of the court to order an amendment. Besides, "married women are not hereafter to be indebted to *equity only* for protection in the enjoyment of their separate estates. * * * They hold them by a legal title, and have a legal right to dispose of them. * * * There is no longer any foundation for the argument that, as equity creates and protects these estates, equity has a right to control them. Rules which have grown up under this idea, which are regarded to some extent illusory, will be hereafter

inappropriate." (*Yale v. Dederer*, 22 *N. Y. R.* 450, 460.) And Judge Daly, in his dissenting opinion in *Gould v. Gould*, adds: "She has no longer occasion for that protection which a court of equity afforded, as the husband is now deprived of that right to or that control over her property which he previously possessed; and as, where rights which did not before exist are conferred, the remedies which are adequate to maintain and secure them are regarded as conferred also, I can see no reason why a married woman should not have that remedy in a matter relating to her separate property, even as against her husband, which is best adapted and the most adequate to enable her to enforce her rights. To that remedy she is entitled, and it is altogether immaterial whether it be a legal or an equitable one. Her rights are no longer dependent upon the favor and protection of a court of equity, but are founded upon positive legislation, which has greatly enlarged them, and if a legal remedy is the best adapted to enforce a right conferred upon her by statute, I can see no reason why she should not have it even against her husband." (*Gould v. Gould*, 29 *How. Pr. R.* 441, 468, 469.) "The question in an action is not whether the plaintiff has a legal or an equitable right, or the defendant a legal or an equitable defense against the plaintiff's claim; but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, or the defendant shows that the plaintiff ought not to have the relief sought for." (*Crary v. Goodman*, 12 *N. Y. R.* 266, 268.)

§ 480. Under the married woman's acts of 1848 and 1849, a *feme-covert* may recover from her husband and his partner, her personal property loaned by her to carry on the business of the firm. The judge who decided the case said: "Nor am I prepared to hold that a loan of money made by a wife under such circumstances, to a firm of which her husband is one of the partners, cannot be recovered because they can make no contract. On the contrary, I think such a contract can be made, and if made, can be enforced at any rate in an equitable proceeding, if not at law." (*Devin v. Devin*, 17 *How. Pr. R.* 514, 515.)

A *feme-covert* is not liable upon her contract to pay for a supper furnished on the occasion of her daughter's marriage, as that will not be deemed a consideration going to the direct benefit of her separate estate. Unless the consideration for her promise went directly to the benefit of her separate estate, she must have done

enough to charge it at the time of the contracting the debt, or there is no action against her, and her estate cannot be legally charged with the debt. (*White v. Story*, 43 Barb. R. 124, 129.)

A judgment recovered against husband and wife during coverture, and for a cause of action accruing after marriage, will not bind the separate estate of the wife. (*Tisdale v. Jones*, 38 Barb. R. 523.)

A married woman, claiming the benefit of the married woman's acts of 1848 and 1849, must show that she was a resident of the state at a time and under such circumstances to entitle her to such benefit. So held in a case where the wife, who was married in Russia in 1847, and came to this state nine years after, and, in January, 1862, took a bill of sale of personal property from her husband in consideration of money loaned by her to him while in Russia, which property was taken upon an execution against her husband, and the action was brought by her to recover its value; and the court decided that the pretended transfer from the husband to the wife, under the circumstances, was null and void. (*Savage v. O'Neill*, 42 Barb. R. 374.)

§ 481. Any person who may hold as trustee for any married woman, any real or personal estate, or other property, under any deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues or profits thereof, for her sole and separate use and benefit. (*Laws of 1849, ch. 375, § 2. 4 Stat. at Large, 514.*) This enactment is in pursuance of the policy inaugurated in 1848, for the more effectual protection of the property of married women, and for extending their rights and powers with respect to it. But as the law now stands, the provisions of this statute will be very seldom brought into requisition, for the legislature of the state has almost dispensed with the necessity of marriage settlements, as it has left little to the husband but a contingent and possible interest in one-third of his wife's real estate. It has taken away the necessity of compelling settlements for the maintenance of the wife, founded upon what was termed her equity, as she has now during her marriage the sole right to the

use of her property, whether real or personal, and the effect of these changes must be to dispense hereafter with a large portion of that equitable jurisdiction in respect to a married woman's property, or in enforcing what was equitable when property had been derived through her, which was exercised for her protection and benefit by courts of equity. Married women are now declared to have a separate legal existence, and are supposed to be abundantly qualified to take care of their own interests and rights, independent of their husbands; and therefore the interposition of trustees between them and their husbands is in theory unnecessary, and trustees of their separate property will seldom be appointed.

§ 482. It has been made lawful by statute for any married woman, by herself and in her name, or in the name of any third person with his assent as her trustee, to cause to be insured for her sole use the life of her husband for any definite period or for the term of his natural life; and, in case of her surviving such period or term, the sum, or net amount of the insurance, becoming due and payable by the terms of the insurance, must be payable to her and for her use, free from the claims of the representatives of the husband or of any of his creditors; but such exemption will not apply when the amount of premium annually paid out of the funds or property of the husband shall exceed three hundred dollars. The amount of the insurance may be made payable in case of the death of the wife before the period at which it becomes due, to her husband or to his, her or their children, for their use, as shall be provided in the policy of insurance and to their guardian, if under age. (*Laws of 1858, ch. 187, as amended by Laws of 1866, ch. 656.*)

The first act in respect to insurances for lives for the benefit of married women, was passed by the legislature in 1840 (*Laws of 1840, ch. 80*), which was in principle the same as the present law. Under the act of 1840, a married woman procured a policy of insurance upon the life of her husband, in her own name and for her sole use, making the insurance money payable to her children in case she should die before her husband; subsequently both husband and wife and their only child perished at sea, by the same disaster, and probably at the same moment; the late court of chancery held that the act did not extend to the case, and that the contract of insurance, in those circumstances, stood upon the same footing as any other contract made by a *feme-covert*, in her

own name, in the life-time of her husband, and without the intervention of a trustee. The decision of the chancellor was based upon the fact that there was no legal presumption from the evidence that the daughter survived the mother, and further, that, inasmuch as the husband and wife both perished together at sea, and there was no evidence to authorize a different conclusion, it was presumed that the husband survived the wife. (*Moehring v. Mitchell*, 1 Barb. Ch. R. 264.)

The surrogate of the city and county of New York decided that the policy of the law of the state in relation to life insurance, is in favor of allowing the wife, either in her own name or through the medium of a trustee, to insure her husband's life free from the claims of his representatives or his creditors. Therefore, in a case where an intestate before his decease had effected an insurance on his life for \$4,000, subsequently surrendered the policy and took out two new policies for \$2,000 each, one of which he assigned in consideration of \$300, the assignee agreeing to pay the future premiums, and on the assignor's decease to pay his widow \$1,500, and the other of which he assigned for the benefit of his wife, the assignee obligating himself to pay the premiums, the policies being of little if any pecuniary value at the time of the assignment, so far as related to the premiums that had been paid, and the company with whom the insurance was effected were empowered by their charter to insure the life of a husband for the benefit of his wife, it was held that, the title being transferred, the legal representatives of the husband and assignor could not recover on the policies. (*McCord v. Noyes*, 3 Brad. R. 139.)

§ 483. Such are the statutory peculiarities of the State of New York respecting husband and wife, and the position, powers and rights of married women, together with the construction which has been given to the various enactments upon the subject, by the judicial tribunals of the state. The statement, which is full and complete, bringing down the statutes and authorities to the present time, necessarily occupies considerable space, but it is thought that the exposition may be of service to the legal profession, not only in the State of New York, but in other states, where a similar policy has been adopted. It will be seen that the reform was inaugurated in the New York legislature, in 1848, but long before this there was a strong sentiment that the wife was the victim of legal oppression, from which she ought to be relieved,

and that the subject came prominently before the constitutional convention of 1846, but failed to become incorporated into the new constitution by a close vote.

Previous to the enabling act of 1848, the common law rule with respect to married women prevailed in the state, by which the personal property of a woman passed absolutely to her husband upon her marriage, nor could she by her own labor or service acquire any thing during its continuance, unless an express agreement was entered into before marriage, or after, by the interposition of trustees, authorizing her to carry on trade or business on her own account. Her husband was entitled to the rents and profits of her real estate, and after her death, if there were issue by the marriage, he had in it a life estate as tenant by the curtesy. All this has been essentially changed by the legislation which has occurred. The statutes have now taken away from the husband any right to the personal property which the wife has at the time of her marriage, or to the rents, issues and profits of her real estate during marriage; and she is allowed during coverture to take real or personal property, and hold it to her sole and separate use; to acquire property by trade, business, labor or service, carried on or performed on her own account, and dispose of the same, and to make bargains and contracts in relation to such property, in almost any mode known to the law or to the practice of the commercial community; and she may sue and be sued in all matters having relation to her property, and may bring and maintain an action in her own name for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole. In a word, the statutes have well nigh removed all of her disabilities by reason of coverture, and have placed her upon substantially the same footing of a *feme-sole*.

CHAPTER XXXIII.

STATUTORY POLICY OF THE NEW ENGLAND STATES RELATING TO MARRIED WOMEN AND MARITAL RIGHTS—LAWS OF MAINE—LAWS OF NEW HAMPSHIRE—LAWS OF VERMONT—JUDICIAL CONSTRUCTION AND DECISIONS.

§ 484. In the State of Maine, a married woman of any age may own in her own right real and personal estate acquired by descent,

gift, or purchase, and may manage, sell, convey and devise the same by will, as if sole, and without the joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance. When payment was made for property conveyed to her from the property of her husband, or it was conveyed by him to her without a valuable consideration paid therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase. The husband acquires no right to any property of his wife by marriage; but the wife may release to her husband the right to control her property, or any part of it, and to dispose of the income thereof for their mutual benefit, and may in writing revoke the same. The wife may prosecute and defend suits at law or in equity for the preservation and protection of her property, as if unmarried, or may do it jointly with her husband. Neither of them can be arrested on such writ or execution; nor can he alone maintain an action respecting his wife's property. She may receive the wages of her personal labor not performed for her own family, maintain an action therefor in her own name, and hold them in her own right against her husband or any other person.

When a married woman dies intestate, her property descends to her heirs; and administration and distribution may take place, as if she had not been married. When the husband abandons his wife or is confined in state prison, the supreme judicial court may authorize her to make contracts, and any person holding personal property to which the husband is entitled in her right, to pay or deliver the same to her, for her disposal, and for which she may make a valid discharge. All contracts lawfully made by the wife by virtue of such power are binding upon her and her husband, and during such absence or confinement she may sue and be sued thereon, and for all acts done by her; and execution may be enforced against her, as if unmarried.

When a married woman comes from any other state or country, and remains in the State of Maine, without living with her husband, she may make contracts, dispose of property, sue and be sued, as if unmarried. When her husband comes and claims his marital rights, her contracts and suits will be affected the same as if they were then first married. (*R. S.* 1857, *ch.* 61.)

§ 485. The statutes respecting the rights and property of married women were enacted in 1844, or since that time; and the husband has a life estate in the real property of the wife acquired prior to the statute of 1844, which may be taken in execution for his debts, provided the marriage was celebrated before that date. Simultaneously with her acquisition of title to the estate, the rights of her husband therein were perfected; and their rights remain unaffected by the subsequent statutes securing to married women their rights of property. The deed of a married woman of her real estate acquired prior to the enactment of the statute of 1844 is void if the husband did not join her in the conveyance. (*Beale v. Knowles*, 45 *Maine R.* 479.) And when the wife owned the money for which she sued, in her own right, at the time of her marriage in 1834, and it was never reduced to possession by her husband during her coverture, but remained under her sole control, the court held that the money became absolutely vested in the husband at the time of his marriage, and, at his death, descended to his heirs as a part of his estate, though he left his wife surviving him as his widow, who then had the money under her own control. (*Jordan v. Jordan*, 52 *Maine R.* 320.)

A *feme-covert* is not capable, under the statutes of Maine, to bind herself by a promissory note, and such an instrument cannot be legally enforced. And when she joins with her husband in a note for money loaned to him, and gives a mortgage of her real estate as security for the payment of the note, the case is not altered. It will then be considered that the money was borrowed on the personal security of the husband, and the wife is not liable for it. (*Roach v. Randall*, 45 *Maine R.* 438. *Vide also Howe v. Wildes*, 34 *ib.* 556.)

The general rule of law is, that a married woman cannot make a binding contract, or be the subject of a suit; but if there has been a *desertion* by the husband, in the ordinary meaning of the term, and their separation has been long continued, and is so complete that he must be regarded as having renounced all his marital rights and relations, such a case would be an exception to the rule, and she would be treated as a *feme-sole*. This has been held to be the rule at common law, as has been before shown. The rights of the parties in such a case, when the contract was made in 1856, are not materially affected by the statutes of the state giving to married women the power to hold and manage their property, and

to enforce remedies in their own names when it has been injured. (*Ayer v. Warren*, 47 *Maine R.* 217.)'

§ 486. Although the recent statutes relating to the rights of married women neither authorize them nor recognize their right to mortgage their real estate, yet it was manifestly not the intention of the legislature thereby to restrict them in the exercise of that right, which existed at common law; and where the wife, the husband joining with her in the deed, conveyed her estate in mortgage to secure a debt of her husband, the mortgage was held to be valid. (*Eaton v. Nason*, 47 *Maine R.* 132. *Spinzer v. Bery*, *Id.* 330.) More yet; the courts now hold that, by the provisions of the statutes of the state, a married woman may execute a deed of mortgage of her separate estate, which will be valid, notwithstanding her promissory notes secured thereby cannot, *in law*, be enforced against her. Therefore, a mortgage to secure the payment of a sum of money may be upheld, although there is connected with it no other obligation or contract of the mortgagor or of any other person to pay the same. The court say, in their opinion, that the power conferred upon married women by the statute, to control, sell and convey their estate, real and personal, is full and perfect. It cannot be more complete. They may, under its provisions, bind their estates as effectually as any other citizen. Thus far the law extends the rights of women under coverture; and, although they still remain under the common law disabilities as to personal contracts; yet, as a mortgage is simply a conditional conveyance of land, designed as security for the payment of money, or performance of some other act, and to be void upon payment or performance, married women may mortgage their property in such a way as fully to pass the title upon the mortgage being foreclosed. (*Brookings v. White*, 49 *Maine R.* 479. *Vide also Humphreys v. Newman*, 51 *ib.* 40.)

§ 487. As the law now stands in Maine, the wife may deed her lands directly to her husband. (*Allen v. Hooper*, 50 *Maine R.* 371.) And a husband, although he be insolvent, may convey real estate to his wife, in payment of a note given her by him, for money of hers loaned him, if there be no intent to defraud or delay creditors. (*Randall v. Sweet*, 51 *Maine R.* 246.) And where the creditors of the husband in any case would impeach the title of the wife to any property conveyed to her, the burden is on him to prove that it came to her directly or indirectly from her

husband, after coverture, and fraudulently as to creditors. (*Winslow v. Gilbreth*, 50 *Maine R.* 90.)

A *feme-covert* may carry on business on her own account, and no action can be sustained against the husband for goods and chattels furnished in the course of her business, even though a portion of the proceeds go toward the support of her husband and family. But where the purchases and sales were made with his knowledge and consent, and he participates in the profits of the business, knowing them to be such, and that she professed to act for him, the court held that the jury may infer that the purchases were made on his credit, and he will be liable to pay the purchase price of such goods. (*Colby v. Lamson*, 39 *Maine R.* 119. *Owens v. Swanton*, *Id.* 125.)

§ 488. Under the present statutes of the state, the husband may lawfully transfer a promissory note to his wife, although the maker is at the time his creditor. To defeat such a transfer, *inadequacy* of consideration is not sufficient. There must be an *intent* also to defraud existing creditors. But inadequacy of consideration is proper to be submitted to the jury for the *sole purpose* of ascertaining the intent of the parties. The common law rule which makes such a transfer from husband to wife absolutely void, has been changed by the statute, and now the same may be sustained. (*Motley v. Sawyer*, 38 *Maine R.* 68. *And vide Davis v. Herrick*, 37 *ib.* 397.)

Although by the statute a married woman may become the owner of real or personal property by bequest, devise, gift, *purchase* or distribution, in order to become the owner by *purchase*, she must make it from her own property, or that of others, by their consent, for her use. The *earnings* of a *feme-covert* are still the property of her husband, and a purchase made on the credit or from the means of her husband, or by the avails of her labor, gives the wife no property in the article purchased. (*Merrill v. Smith*, 37 *Maine R.* 394.) But under the act of 1844, chapter 117, amended by the act of 1847, chapter 27, a woman, during coverture, may acquire property by purchase in her own exclusive right; and in property thus acquired, and paid for with her money, though the husband was the agent employed by her in making the purchase, he has no right of possession, and can maintain no action for taking it away against persons acting under her direction. (*Southard v. Piper*, 36 *Maine R.* 84.)

§ 489. By the statute of 1847 amending the act of 1844, to secure to married women their rights in property, a subsequent conveyance of land by a husband directly to his wife is made effectual to pass the title, unless the creditors may be thereby defrauded. (*Johnson v. Stillings*, 35 *Maine R.* 427.)

A married woman may maintain a suit in her own name alone, to recover possession of land belonging to her. She may convey her land by a deed executed jointly by herself and husband for that purpose; and a deed so executed is not entirely void as to the wife, though executed when she was under the age of twenty-one years. She may, however, avoid it after coming of age by bringing her suit for the land; although the tenant in such suit claiming under such a deed will not be accountable for any rents or profits which accrued prior to notice that the wife intended to avoid the deed. (*Webb v. Hall*, 35 *Maine R.* 336.)

The life estate which the husband had in his wife's land at common law has been taken from him by the act of 1844, in behalf of the wife; only upon condition, however, that she proved the title not to have come to her from the husband after coverture. This act of 1844, and the amendatory act of 1847, and the additional act of 1848, respecting the rights of married women, were prospective only in their operation. (*Eldridge v. Preble*, 34 *Maine R.* 148. *Clark v. Viles*, 32 *ib.* 32. *Greenleaf v. Hill*, 31 *ib.* 562. *McLellan v. Nelson*, 27 *ib.* 129.)

§ 490. The statutes enlarging the rights of married women as to property do not extend to rights of action for tort; therefore, to recover for an injury sustained by a married woman through the malpractice of a surgeon, the husband *must* be a party to the suit. The previous desertion of the wife by the husband does not remove the necessity that, in such a suit, he should join as co-plaintiff; and a discharge of the cause of action, given by such husband to the defendant, is a bar to such a suit, when brought in the joint names of the husband and wife. (*Bullard v. Russell*, 33 *Maine R.* 196.)

The statute of 1844 securing to married women their property did not so alter the common law as to enable a *feme-covert* to sell her personal property without the assent of her husband. (*Swift v. Luce*, 27 *Maine R.* 285.)

The foregoing are substantially the distinctive features of the statutes and judicial decisions respecting marital rights in the State of Maine, and more especially of the policy of the state,

concerning the rights, powers and liabilities of married women. Some of the provisions of the statute upon the subject are copied in substance from the statutes of Massachusetts, which will be noticed hereafter.

§ 491. In the State of New Hampshire, it is provided by statute that every married woman shall hold to her use, free from the interference or control of her husband, all property inherited by, bequeathed, given or conveyed to her, provided such conveyance, gift or bequest is not occasioned by payment or pledge of the property of the husband; and any married woman holding property to her sole and separate use, free from the interference or control of her husband, may sue and be sued in her own name, as though sole, in all matters pertaining to such property, and upon all debts contracted by her before marriage. (*Laws of 1860, ch. 2342.*) And with respect to all such property, a married woman has the same rights, and possesses and is entitled to the same remedies, in her own name, both at law and in equity, and she is made liable to be sued at law and in equity, upon any contract by her made, or any wrong by her done, in respect to such property, in the same manner and with the same effect as if she were unmarried. (*Comp. Stat. 382.*)

It is further provided by statute, that after three months of desertion, or of any other thing, which, if longer continued, will be a cause of divorce, the wife may hold in her several right, and dispose of property acquired by her in any way, and the earnings of the minor children, until the desertion ceases. And the judge of probate in the county where she resides has power to make provision for her and her children from the property of the husband, whereupon she will possess the same rights, and her property will descend, the same as if she were single. (*Comp. Stat. of 1853, ch. 158.*)

There is another provision of the statute of 1860, which empowers the supreme judicial court to assign to the wife such part of the real, personal or mixed estate of her husband as may be deemed just and expedient, in cases where the husband is insane, or has joined any religious society which professes to believe the relation of husband and wife unlawful; and the estate so assigned to the wife may be held by her to her sole and separate use so long as such husband shall continue insane, or connected with such religious society. (*Laws of 1860, ch. 2342, § 2.*)

A *feme-covert* may make a will of the property which she holds in her own right, and such will passes the property devised to any devisee except the husband, although she cannot make a will to affect the husband's tenancy by the curtesy. (*Laws of 1854, ch. 1522. Laws of 1860, ch. 2342, § 3.*)

§ 492. Under the statute of 1846, the courts have held that a married woman can contract only in respect to property conveyed to her sole and separate use, free from the control and interference of her husband. She cannot contract in anticipation of any such purchase to her sole use. And no action can be maintained against a married woman upon a note or obligation given by her for money hired as the purchase-money of land to be conveyed to her sole and separate use, though it appears the money was in fact so applied. The judge who delivered the opinion of the court remarked: "Considering the great changes which have been making from year to year in relation to the rights of married women, which have steadily tended to release to them their rights of property, and their free agency in relation to its control and management, the court are not disposed to adopt a narrow construction of the statutes on this subject; but they are, at the same time, painfully aware that whenever the line may be drawn, it will be long before the public will understand and recognize the point where the power of a married woman to bind herself by her bargains ceases, and that frauds upon the thoughtless and inconsiderate must often occur." After reviewing several cases, the learned judge adds: "And the principles thus settled are approved by the court here, and must govern this case. They go to the extent that the power of the married woman to bind herself by her contract, under this statute, and, as we incline to think, under the statute of 1860, exists only in cases where she was, at the time of making the same, entitled to hold separate property to her own use, and where the contract relates to that property. From this view it results that she can make no contract, for money or property, in anticipation of the purchase of such separate estate; and consequently the note on which this action is founded, being given for money hired for the purpose of buying such property, was unauthorized by the act, and is not binding on the defendant." (*Ames v. Foster*, 42 N. H. R. 381, 383, 385.)

Whether the statute of 1860 applies to property owned by a woman before her marriage, seems to be in some doubt. The

judge, in giving the opinion of the court, said: "It may be doubtful whether the statute of 1860 does not mean simply this, that when any property shall be inherited by, bequeathed, given or conveyed to, any married woman, she shall hold the same to her own use, etc.; that is, that it relates to property only which shall thus come to the wife after marriage." (*Pettingill v. Butterfield*, 45 N. H. R. 195, 199.)

§ 493. When land was purchased in 1855, and conveyed to the wife in the ordinary form, and not to her sole and separate use, a note and mortgage given by her as security for the price, have no legal validity whatever. In such case, if the conveyance was assented to by the husband, and he acquired and claimed an interest in the land by it, a court of equity, on proof of a demand and refusal, will decree that the husband and wife make a valid mortgage to secure the payment of the price. (*Leach v. Noyes*, 45 N. H. R. 364.)

So, when a wife, having a separate income, purchased solely upon her own credit suitable furniture for a house held for her by trustees, and occupied by herself and her husband, and subsequently died, having bequeathed the furniture to her husband, it was held that the vendor, who had thus sold the furniture to her with knowledge of the facts, could not recover for it of the husband in assumpsit. (*Hill v. Goodrich*, 46 N. H. R. 41.)

So it has been held that a married woman is not bound by a promissory note given during coverture, although at the time of her marriage she had, by inheritance, both real and personal estate, unless it be shown that such estate was held to her sole and separate use, and that the promise was made in respect to that estate. (*Shannon v. Canney*, 44 N. H. R. 592.)

§ 494. By the statute it is provided, that "any devise, conveyance, or bequest of property, real, personal, or mixed, may be made to any married woman, to be held by her without the intervention of a trustee, to her sole and separate use, free from the interference or control of her husband; and she shall hold, possess and enjoy the estate so given, devised, conveyed or bequeathed accordingly; and shall in like manner hold any property which she may receive under the provisions of any deed of trust made either before or after marriage." It is further enacted by the statute, that in case any such married woman "shall die intestate, all her right and interest in the personal property thus held, shall vest in her husband, unless

other provision is made in relation thereto by the terms of the contracts or conveyances" by which she holds the property; and that the husband shall be entitled to his estate by the curtesy, in all lands and tenements so held by her. The husband, however, is required to take administration on the estate of his wife, and hold all the property, except the right by curtesy, subject to her debts. (*Laws of 1846, ch. 327, §§ 2, 17. Comp. Laws, ch. 158, §§ 12, 29.*)

As the statutes now stand, it has been held that a married woman holding real estate to her sole and separate use, possesses the same rights and powers, and is entitled to the same remedies at law and in equity, in respect to such property, as if she were sole and unmarried; and that she may rent or lease the same to her husband or any other person. (*Albin v. Lord, 39 N. H. R. 196.*) But under the statutes, a *feme-covert* cannot contract and be liable for debts generally, so as to subject her separate property to their payment, but her contracts to be valid, must be confined to and connected with the property itself; her liabilities are, first, contracts made in regard to the property itself; secondly, wrongs connected with the property; and, thirdly, contracts made by and causes of action existing against her while sole before her marriage. (*Bailey v. Pearson, 29 N. H. R. 77.*)

§ 495. The personal services and earnings of the wife and the profits and income of any business in which she may engage, under the statutes relating to the rights of married women, belong to the husband, and cannot be held by the wife to her sole and separate use. (*Hoyt v. White, 46 N. H. R. 45.*)

A chattel purchased by a married woman with property held by her to her separate use, under the statute of 1846, or with the proceeds or income of such property, when the husband has not attempted to exercise any ownership over such proceeds or income, and has not in any way made claim to such chattel, is her property, and is not liable to be taken on execution for his debts. In such a case it has been held that the husband may act as agent for his wife in making the purchase. (*Hutchins v. Colby, 43 N. H. R. 159.*)

When a husband purchases land and the deed is taken to his wife, *prima facie*, no trust results in his favor. And when money raised by a mortgage of the wife's land is held by her, and the husband has not assumed the mortgage debt, or attempted to control the money borrowed, she is not liable in a foreign attachment

as trustee for her husband on account of such money. (*Dickinson v. Davis*, 43 *N. H. R.* 647.)

When a deed of the wife's land purports to be the conveyance of the wife alone, and contains no recital that the husband is a party, but is executed by the husband and wife, it is the deed of both, and passes the title of both. (*Woodward v. Seaver*, 38 *N. H. R.* 29.)

When real estate is conveyed to the wife, no trust arises to the husband from payments made after the time of the purchase. (*Francestown v. Deering*, 41 *N. H. R.* 438.)

When bank stock was transferred to the wife on the fifth day of July, 1860, the court held that the husband's marital right to reduce it to possession was not affected by the act of July 4, 1860, as that act did not take effect until August of that year, and therefore that the husband's interest on the stock was to be determined by the rules of the common law; and when in such case the husband survived the wife, and afterward died without having reduced the stock into possession, it was held that the administrator of the wife, who owed no debts, could not maintain an action for this stock, against the husband's representative; and it was further held that on the death of the wife the husband was entitled absolutely to the stock, subject only to her debts, and that on his subsequent death this interest vested in his representative. (*Atherton, Admr. v. McQueston*, 6 *Am. Law Reg.* [*N. S.*] 250. *S. C.* 46 *N. H. R.* 205.)

§ 496. By the statutes of New Hampshire, a homestead to the value of \$500, is exempt from attachment and execution and is in no way liable for the husband's debts, nor subject to distribution or devise, while a widow or a minor child lives thereon. But the right may be waived by the deed of the husband and wife, and is not valid against a claim on note or mortgage of husband and wife, or for labor less than \$100, or a lien by the seller of the estate for its price, or a debt contracted for the erection of the buildings, or for taxes. (*Comp. Stat. ch.* 196, and *vide Laws of 1866, ch.* 4252.)

Under this statute the courts hold that a widow is entitled to dower and homestead in an equity of redemption in real estate of her late husband against all persons, except the mortgagee or those claiming under him. But she cannot have dower or homestead as against the mortgagee, except by payment of the whole mortgage debt; against any and every one having an interest in the redemp-

tion, and who has actually redeemed the mortgage. She can hold her dower and homestead upon payment of contribution. If the administrator of the husband redeems the mortgage from assets of the estate, then the widow takes dower and homestead without contribution. After the decease of the mortgagee, if the equity of redemption is purchased by the mortgagor, the two estates, under the mortgage and the equity of redemption, become merged, as though some third person had purchased the equity and then redeemed the mortgage; and in such case the widow may hold her dower and homestead discharged from the mortgage by contribution only. In such case, it is immaterial whether the dower and homestead, or either of them, be first assigned or the equity be first sold, since the owners of these interests, in either case, stand on the same ground in equity, their separate estates commencing, not from the time of the assignment or sale, but from the death of the intestate; hence the mortgage debt is to be shared between the owner of the equity of redemption and the widow having dower and homestead, according to the relative value of the proportion of mortgaged property held by each. (*Norris v. Morrison*, 5 *Am. Law Reg. [N. S.]* 700, 701. *S. C.* 45 *N. H. R.* 490.) This homestead provision is a policy somewhat peculiar to New Hampshire, and some of the other New England States. If a creditor, whose debt accrued before the passage of the act, present his claim to the commissioner on an insolvent estate, takes his dividend, and without objection allow the widow's homestead to be assigned by the probate court; and the administrator, for the payment of the debts allowed, sells the land assigned subject to the widow's homestead, such creditor cannot afterward require the administrator to sell any interest of the estate in the land assigned for homestead to pay the balance of his debt; in such case, if a creditor would enforce his claim against the widow's right of homestead, he should object to the assignment till his debt is paid. (*Judge of Probate v. Simonds*, 6 *Am. Law Reg. [N. S.]* 317, 318. *S. C.* 45 *N. H. R.* 363.)

In New Hampshire, a negotiable note given to a third party by a husband before his marriage, is not extinguished by the mere fact of its purchase from such third party by the wife, after marriage, with money belonging to her before marriage, not reduced to possession by the husband; and in case of such purchase by the wife, the note may be transferred by her with her husband's assent, and the purchaser may maintain an action upon it against the hus-

band. (*Russ v. George*, 5 *Am. Law Reg.* [N. S.] 700. S. C. 45 N. H. R. 467.)

§ 497. In the State of Vermont, when any married man shall leave the state, abandoning his wife, and not making sufficient provision for her maintenance, such wife, if of the age of eighteen years, may be authorized by the supreme court, to sell and convey her real estate, or any part thereof, and also any personal estate which may have come to the husband by reason of the marriage, and which may remain within the state undisposed of by him; and the court may also in such case authorize the wife to receive any money or other personal property, to which the husband is entitled in her right, and to give a discharge for the same. The wife, in such case, during the absence of her husband, is entitled to the proceeds of her own earnings, and of her minor children, and the same are to be under her sole control, and are not liable for the debts of the husband. All the proceeds of the sales authorized to be made by the wife, and all other money and personal estate coming into the hands of the wife as above provided, may be used and disposed of by her, during the absence of her husband, for the necessary support of herself and family.

When the real estate of the wife is taken for a public use, or for a railroad, turnpike or way, or may be damaged by reason of the taking thereof, the damages or compensation awarded may be so invested and disposed of as to secure to her the same right, use and benefit of and in the sum so awarded, and the income thereof as if it had not been so taken or damaged.

When any married man is confined in the state prison, his wife is deemed a *feme-sole*, and is given the same remedy by statute as when the husband absconds, as above provided; and the real estate of any married woman who lives apart from her husband, by reason of the criminal conduct or ill-usage of her husband may be ordered and decreed by the chancellor to her sole use and benefit, or such part thereof as he may think reasonable, may be decreed to her sole use. Married women may devise, by last will and testament, their lands, tenements and hereditaments, or any interest therein descendible to their heirs.

The statute further provides that the rents, issues and products of the real estate of the wife, and all moneys and obligations arising from the sale of such real estate, shall be exempt from attachment for her husband's debts; and no conveyance made by the husband

during coverture of the same, or of interest in such real estate, will be valid unless it be by the joint deed of the husband and wife ; and all property consisting of stocks or bonds given a married woman by her parents or parent, is exempt from her husband's debts, and may be disposed of by her as if unmarried.

A *feme-covert* may cause the insurance of the life of her husband for her own use and benefit, and the policy will inure to the benefit of herself and children. These are substantially the provisions of the statutes of Vermont in respect to the rights and powers of married women. (*Gen. Stat. 1863, ch. 71.*)

There is also a provision of the statute securing to the husband and wife a substantial homestead, which upon the death of the husband vests in the widow and children, without being subject to the payment of the debts of the deceased, unless the same was legally discharged during the life of the husband. The homestead cannot be conveyed by the owner unless the wife joins in the conveyance. (*Gen. Stat. 1863, ch. 68.*)

§ 498. The statutes of the state declare that a husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried ; and in case of desertion or ill-treatment of the wife by the husband, the wife may make disposition of her property without the husband's joining in the deed or conveyance. (*Gen. Stat. ch. 65, § 2, and ch. 71, § 1.*) The first of these enactments does not declare the sole deed of the wife void, nor does it imply that it is, except as resulting from the effect of coverture, at common law. It has regard only to the effect of that relation at common law, and was designed to provide a mode by which the wife might transfer the title to her real estate at law, notwithstanding the common law effect of coverture. It is an *enabling* and not a disabling or restrictive act, and can by no means be regarded as trenching upon the scope of equitable jurisdiction and interposition in reference to the rights, liabilities, and duties of married women in respect to their property and contracts. The latter of said statutory provisions, as judicially interpreted, was designed to give not an *exclusive*, but an additional and somewhat summary means as against the husband, for insuring to the wife the use and benefit of her own property for her support in case she should be abandoned by, or compelled by ill-treatment to live apart from him. They cannot, upon any ground of reason, be construed as taking

away or curtailing the scope of interposition by courts of equity in cases falling within the ordinary cognizance of such courts. Upon this reasoning, it has been held that a married woman contracting a debt for her own benefit, may make it an express charge on her separate estate, and her mortgage for that purpose will be upheld in equity. The court further held in the same case, that a husband may by his acts, as well as by express agreement, divest himself of his marital rights in property so as to make it her separate estate.

In the year 1847, a wife left her husband, and, in 1852, property was devised to her, which she occupied and controlled ever after, without any interference of her husband. In 1857, she made a mortgage upon her estate to secure payment of a debt for necessities for the support of herself and children, and in 1858 she obtained a divorce and made a second mortgage on the same property. The court held that although as between husband and wife the devise to her lacked the affirmative words necessary to constitute a separate estate in the strict meaning of the terms, yet under the circumstances it was to be considered her separate estate as between her and the first mortgagee, and the court declared that the first mortgage might also be supported in equity on the principle that when a married woman trades as a *feme-sole*, or obtains credit on her separate estate, a court of equity will hold the proceeds of the business or the estate subject to the claims of her creditors; or on the principle that the estate of a married woman living apart from her husband is liable for her maintenance. The second mortgage having been taken with notice of the circumstances of the first, was held to have no equity to come in before that. (*Frary v. Booth*, 4 *Am. Law Reg.* [N. S.] 142. *S. C.* 37 *Vt. R.* 78.)

A mortgage given by the wife to secure the payment of money borrowed to pay toward the purchase of the mortgaged property, was held by the court to be valid against the husband and the children, the wife having deceased. (*Buchanan v. Chamberlin*, referred to in *Frary v. Booth*, *supra*.) And in a still later case, the court held that an agreement made between husband and wife during coverture, that certain personal property or funds belonging to him shall become her separate property, will be enforced in equity, if it is so far carried into effect as to separate the property or fund from the residue of the husband's estate, and place it in the name and exclusive control of the wife. (*Cordell v. Ryder*, 4 *Am. Law Reg.* [N. S.] 56. *S. C.* 35 *Vt. R.* 47.)

§ 499. The mere fact that a husband signed a note with his wife, given for money to pay in part for land deeded to the wife, when it does not appear that any reliance was, or could be placed upon his paying it, and the note was secured wholly by mortgage of her lands, and those of her relations, is held by the court, not enough to show that the husband had any real or equitable interest in the premises that could be taken by his creditors. (*Buck v. Gilson*, 37 *Vt. R.* 653.)

If a husband improve his wife's land without any agreement with her through trustees or otherwise, that his labor and money expended thereon shall vest in him any interest therein, or entitle him to any claim against or compensation from her property, he gains no right or title thereto which his creditors can reach by attachment or by the aid of a court of equity. (*Webster v. Hildreth*, 33 *Vt. R.* 457.)

Since the passage of the married woman's act of 1847, a husband has not, during his wife's life, an interest subject to attachment by his creditors, in the betterments made by him upon her land, by way of cultivation, or buildings in the ordinary course of occupancy, husbandry and improvement, or in the rent of such lands when leased under such improvements to a third party (*White v. Hildreth*, 32 *Vt. R.* 265.)

But it has been held that, by the language of the married woman's act, the annual product of the wife's land is not exempted from the husband's control, or from his creditors. In giving the opinion of the court, Redfield, Ch. J. observed: "In regard to the effect of the statute, which is similar to those of the other American States, there seems to have been, to some extent, a popular impression that it would exempt the annual products of the wife's lands from the control of the husband or his creditors. Such was the decision of the court below, and such the impression of one member of this court, at the first argument. But a careful examination of the terms of the statute, cannot fail, we think, to convince all, that the words used have no very marked fitness to express the yearly products of land, which are the joint results of labor and the use of the land." (*Bruce v. Thompson*, 26 *Vt. R.* 741, 746.)

§ 500. The *prima facie* inference that a deed taken to the wife of the person who pays the consideration for it, was intended as a gift to her, may be rebutted and overcome by parol proof to the

contrary; and if this is done, a resulting trust will exist in favor of the husband. Upon this principle, where the orator purchased and paid for a piece of land, the deed of which was taken to the wife, and the proof being satisfactory that it was not intended as an absolute gift to her, the court held that there was an implied or resulting trust which a court of chancery would execute in his favor; and it seems that if the husband had so taken the deed under a misapprehension as to its legal operation, supposing that it would have the same effect as though taken to himself and wife jointly, a court of equity would be justified in compelling the parties interested to allow it to have that operation. (*Wallace v. Bowen*, 28 *Vt. R.* 638.)

No transaction between husband and wife, during coverture, will create a debt against the estate of the wife after her decease. But if a husband should make permanent improvements upon the wife's estate, greatly beyond the value of the rents, and should unexpectedly be deprived of the same, by a dissolution of the coverture, by the death of the wife, it is possible a court of equity, in a strong case, might grant some relief, by a division of the estate, to prevent great injustice, as in some sense an unexpected occurrence, and so coming fairly within its jurisdiction to relieve from accident. But as the case before the court afforded no such state of facts, the point was not decided, and thereupon left in doubt. (*Pierce v. Pierce*, 25 *Vt. R.* 511.)

A husband suffered his wife to set up the millinery business in her own name; and to manage it at her own discretion; he having nothing to do with making the purchases, keeping the accounts, or paying the debts of the business, and having furnished no capital for which he had not been repaid, and having had no communication with those of whom his wife made her purchases. The court held that, on equity principles, the stock and property in the millinery shop must be treated as the separate property of the wife, and be held liable for her debts and subject to the demands affecting it; and that in such a case the husband has no equity to the goods of his wife on the ground that he had supported her and assisted her occasionally in the business, which will stand against the right of her creditors. (*Partridge v. Stocker*, 36 *Vt. R.* 108.)

§ 501. The wife of an intestate received during coverture certain personal property by gift and inheritance, and also acquired some money by her own personal earnings; the intestate always regarded all this as his wife's separate property, and allowed her to treat and

control it as such. The property was, during coverture, reduced to money, and all her money was then loaned and notes taken therefor in the husband's name; but they were always regarded and treated by him as her separate property, and she kept them in a separate parcel and room from that belonging to him. Shortly before the intestate's death, his wife, being about to leave home temporarily, left her parcel of notes in her husband's care for safe keeping, and they were found among his papers by his administrator and inventoried by him as belonging to the intestate's estate, the widow, however, claiming them as her own. On this state of facts the court held that, as against the heirs of the husband, the notes were, in equity, the sole property of the wife; and the administrator was therefore allowed, in the settlement of his account, to credit himself with their full amount, which he had realized and paid over to the widow. (*Richardson v. Merrill*, 32 *Vt. R.* 27. *Vide also Porter v. The Bank of Rutland*, 19 *ib.* 410.)

So also it was held that when both husband and wife have always treated as the latter's separate property, and as under her entire control, money and notes taken for the loan of money belonging to her before, or accruing to her during, coverture, her right to hold and dispose of the same as she may choose will be recognized and protected by courts of law as well as of equity. She may, therefore, make such notes the subject of a *donatio mortis* to her husband as trustee for other persons; and, even though the husband do not reduce them to possession during her life, the delivery of them to him by her for that purpose will vest in him a good legal title to them as against her administrator. (*Caldwell v. Renfrew*, 33 *Vt. R.* 213.)

§ 502. The mere delivery to the husband, by the makers of a promissory note, given for the purchase of the real estate of the wife, and payable to her or bearer, which the husband immediately afterward delivers to the wife, who thereafter retains the same in her possession, it has been held, does not constitute such a reduction of the note to possession by the husband as divests the property of the wife therein. To constitute such a reduction to possession of the *choses in action* of the wife, the husband must do some *positive act* to reduce them to his own possession. (*Barber v. Slade*, 30 *Vt. R.* 191.)

So, also, it is held that the mere fact that a note is made payable to a married woman during coverture, and is expressed to be for

value received, imports *prima facie*, that the consideration proceeded from her or her real or personal estate, and the note is her *chose in action*, and passes to her administrator unless reduced to actual possession by the husband before her death. (*Stearns v. Stearns*, 30 Vt. R. 213.)

A wife who voluntarily and without good reason, has, for a considerable period, lived apart from her husband, and has supported herself without any assistance from him, may, if the husband does not previously claim her earnings, receive them herself, and after they have been paid to her, the husband cannot recover them of the person from whom they were due. (*Norcross v. Rogers*, 30 Vt. R. 588.)

The plaintiff and his wife had difficulty and separated, and he subsequently told her that "if she was not going to live with him again she might have a part of the household furniture," but nothing was said as to what articles, or how much, she should have; the court held that this language did not import a license to the wife to go to the plaintiff's house in his absence and take away whatever she pleased without his knowledge or consent; and the defendant having, in such a case, assisted the wife in a 'wrongful taking and removal of the husband's household furniture, the court further held, that, in an action of trover against such defendant therefor, the rule of damages was correctly held to be the value of the property, with the interest, notwithstanding it had been in the exclusive use and occupation of the plaintiff's wife. (*Crump v. Oaks*, 38 Vt. R. 566.)

Under a deed to a husband and wife to hold during their lives and the life of the survivor of them, the husband, in an action of ejectment, may recover to the extent of the interest of both, without joining his wife as co-plaintiff. (*Park v. Pratt*, 38 Vt. R. 545.)

§ 503. With respect to the Vermont homestead law, the courts have held that the property is subject to the payment of the owner's debts contracted before the act took effect, December 1, 1850, or the purchase of the homestead. (*Perrin, Administrator, v. Sargeant*, 33 Vt. R. 84.)

The owner of a homestead, having a wife, may convey it by his own deed, and pass the title thereto during his life-time. After his death, and not before, the wife, if she survives him, may assert her right to it, provided it has not been lost by acquiring another homestead. (*Davis v. Andrews*, 30 Vt. R. 678.)

Under the act, it has been held, that after the decease of the housekeeper or head of the family, his widow has the right to hold, control and enjoy the homestead as a home for herself, without restraint or abatement by any of the children of her deceased husband, who are not members of her family. The clear design of the law, the court holds to be to continue the *homestead entire*, as the home of the widow, or of the widow and children constituting the family at the decease of the husband, and no rights of the children become operative to sever or divert such homestead from full occupancy and enjoyment, as the *family home*, so long as the widow, or widow and children, see fit to continue it as such family home. (*Keyes v. Hill*, 30 *Vt. R.* 759.)

The provisions of the statute relating to homesteads are held to be sufficiently broad and comprehensive to include and establish a homestead right in lands in which the housekeeper or head of the family is the owner of an undivided share as tenant in common with others; and the provisions of the statute are adequate to ascertain and set out the homestead right in cases where the title is thus special and limited. The incumbrance of the homestead right is attached, not to the land, but to the husband's estate in the land; and his widow and minor children are entitled to a full homestead right in his moiety or share in the common property. The right does not attach to the whole of the real estate owned in common. (*McClary v. Bisby*, 36 *Vt. R.* 254.)

Under the provisions of the statute, the exemption of the homestead applies only to the house and the land connected with it, and will not include a distinct and separate parcel not adjoining the house lot. (*Mills v. Grant*, 36 *Vt. R.* 269.)

The products of a homestead are exempt from attachment and execution absolutely and without any qualification or exception, even if the debtor has received an equivalent from other portions of his possessions. (*Jewett v. Guyer*, 38 *Vt. R.* 209.)

The act of 1857, providing for relief in certain cases where the homestead cannot be conveniently set out in severalty, applies as well to the homestead left by a deceased person, as to that of persons in life. (*Chaplin v. Sawyer*, 35 *Vt. R.* 286.) Under the laws of the state relating to the homestead, in force in 1858, both homestead and dower may be set up in the same estate, but the dower is to be reduced by the amount of the widow's interest in the homestead. (*Chaplin v. Sawyer*, *supra*.)

CHAPTER XXXIV.

STATUTORY POLICY OF THE NEW ENGLAND STATES RELATING TO MARRIED WOMEN AND MARITAL RIGHTS—LAWS OF MASSACHUSETTS—LAWS OF RHODE ISLAND—LAWS OF CONNECTICUT—JUDICIAL CONSTRUCTION AND DECISIONS.

§ 504. In the State of Massachusetts, the property both real and personal, which a married woman owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade, business, labor, or services, carried on or performed on her sole and separate account, or received by her for releasing her dower by a deed executed subsequently to a conveyance of the estate of her husband; that which a woman, married in the state, owns at the time of her marriage, and the rents, issues, profits, and proceeds of all such property, are declared by statute to be her sole and separate property, and may be used, collected, and invested by her in her own name, and are not subject to the interference or control of her husband, or liable for his debts. The husband and wife may, by their joint deed, convey the real estate of the wife which is not her separate property, in like manner as she might do by her separate deed if she were unmarried, but the wife will not be bound by any covenant contained in such joint deed. (*Gen. Stats.* 1860, *ch.* 108, §§ 1; 2.)

§ 505. A married woman in Massachusetts may bargain, sell and convey her separate real and personal estate, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole. But no conveyance by her of shares in a corporation or of any real property, except a lease for a term not exceeding one year, and a release of dower executed subsequently to a conveyance of the estate of her husband, will be valid, without the assent of her husband in writing, or his joining with her in the conveyance, or the consent of one of the judges of the supreme judicial court, superior court, or the probate court, granted on her petition in any courts on account of the sickness, insanity, or absence from the state of her husband, or other good cause; and

the husband if within the state must have such notice of the petition as the judge may order. (*Gen. Stat. ch. 108, § 3.*)

§ 506. Trustees may be appointed by the supreme judicial court, on the petition of a married woman having separate property, to hold the same in trust for her, and she may thereupon convey the same to the trustee upon such trusts and to such uses as she may declare. The trustee may prosecute and defend all actions in relation to such property brought by or against her, founded on any cause of action relating to the same; and the property in his hands is made liable to be attached or taken on execution in any such action.

The contracts made by a married woman in respect to her separate property, trade, business, labor, or services, will not be binding on her husband, nor render him or his property liable therefor; but she and her separate property will be liable for such contracts in the same manner as if she were sole.

Payment may be made to a married woman for wages earned by her labor, and her receipt for the income of property held in trust for her, or for the principal where the same is payable to her, or for the payment to her of money deposited by or due to her, before or after marriage, will be a valid receipt and discharge, although her husband does not join therein.

The real estate and shares in any corporation standing in the name of a married woman, which were her property at the time of her marriage, or which became her property by devise, bequest, or gift, of any person except her husband, are not liable to be taken on execution against her husband for any debt contracted or cause of action arising after the third day of June, 1855. (*Gen. Stat. ch. 108, §§ 4, 5, 6, 7.*)

§ 507. A married woman having a separate estate may be sued for any cause of action which originated against her before marriage, and her property is made liable to be attached and taken on execution in the same manner and with the same effect as if she were sole. The husband of a wife married in the state after the third day of June, 1855, is not liable to be sued for any cause of action which originated against her before marriage.

A married woman may make a will of her real and separate personal estate, in the same manner as though he were sole; but such will cannot operate to deprive her husband of more than one-half of her personal property without his consent in writing.

These provisions, however, are declared not to invalidate any marriage settlement or contract, or authorize the husband to convey or give property to his wife, or destroy or impair his rights as tenant by the curtesy, or enable a married woman to destroy or impair the same by any will or conveyance without his written assent.

Where the guardian of a ward is licensed to sell the interest of his ward in any real estate, the wife may join with the guardian in the conveyance, and release her right of dower and the estate, or right of homestead in the premises granted; and when such guardian is licensed to sell the interest of his ward in any real estate of his wife, the wife may join in the conveyance, and thereby sell and convey all her estate and interest in the premises granted. But in case of any such release of dower, or the estate or right of homestead, or of such conveyance of her own estate, the proceeds of the sale may be so invested and disposed of as to secure to her and the minor children of the owner, if it is an estate or right of homestead, the same right, use and benefit of and in the principal sum and the income thereof that she or they would have had therein if it had not been sold; and any agreement made between her and such guardian for receiving and disposing of such proceeds will be valid and binding on all persons interested in such premises, provided that the agreement must be approved by the probate court for the county in which the guardian was appointed, or by the supreme court of probate, in case she and the guardian cannot agree. (*Gen. Stat. ch. 108, §§ 8-13.*)

§ 508. The wife of a man who is under guardianship may join with the guardian, and the guardian of a woman may join with her husband, in making partition of her real estate held in joint tenancy or in common, and they may make the necessary release or conveyance necessary or proper for the purpose.

Provisions are also made by statute for the conveyance of the husband's or wife's real estate, in cases of insanity of the owner, by a guardian duly appointed and authorized for that purpose, and, in such cases of insanity of the husband, provisions may be made for the wife in lieu of dower, and for an allowance for the support of the wife out of the estate of the husband, to be paid to her by the guardian. The amount of allowance in such case is determined by commissioners appointed by the court upon her petition. (*Gen. Stat. ch. 108, §§ 14-26.*)

The provisions in favor of married women are extended to parties marrying out of the state, and to women coming from another state or county into the state without their husbands, such husbands having never lived in the State of Massachusetts. (*Gen. Stat. ch. 108, §§ 29, 30.*)

§ 509. A wife whose husband has absented himself from the state, abandoning and not sufficiently maintaining her, or whose husband has been sentenced to confinement in the state prison, may upon her petition be authorized by the supreme judicial court to sell, convey and receipt for, her real and personal estate, and any personal estate which may have come to her husband by reason of the marriage, and which remains in the state undisposed of by him, or to which he is entitled in her right; and to use and dispose of such property or the proceeds thereof during the absence or imprisonment of her husband, as if she were unmarried. And the court may further authorize such wife to make contracts in her own name, and to sue and be sued in law or equity, as if she were sole. The authority so granted will continue until the husband returns into the state and claims his marital rights, or is discharged from prison, and during its continuance the wife may do all acts necessary for its full exercise. And no suit when such woman is a party will be abated by the return of her husband into the state or his discharge from prison, but he can be admitted to prosecute or defend the . . . same jointly with his wife in like manner as if they had intermarried after the commencement of the suit. (*Gen. Stat. ch. 108, §§ 31-35.*)

§ 510. Under the provision of the statute requiring the assent of the husband to the wife's deed of her sole and separate property, it has been held that a woman who during coverture executed such a deed without the assent of her husband in writing, as required by the statute, will not be compelled, after her husband's death, by a court of equity, to execute a new and valid deed to the grantee; although the woman's husband orally assented to the original deed. Foster, J., in delivering the opinion of the court, observed: "The defendant, while a married woman, executed to the plaintiff a quitclaim deed of an estate held by her as sole and separate property, who has since deceased, her husband did not join; and to which he never gave any written assent. The consideration of the conveyance was an agreement by the plaintiff to support the defendant and her husband during their joint lives and the life of the sur-

vivor. The deed of a married woman, without her husband's joinder, at common law is absolutely void. The statute from which she derives her only power to convey her sole and separate property (*Gen. Stat. ch. 108, § 3*) in express terms enacts that no conveyance of any real property, except a lease for a term not exceeding one year, and a release of dower subsequently to a conveyance by her husband, shall be valid without the assent of her husband in writing or his joining with her in the conveyance.

"It is not contended that the deed actually executed was otherwise than utterly void; its admitted invalidity is the foundation of the supposed equity which the plaintiff now invokes the aid of the court to enforce. Nor is it claimed that while the husband lived there was any foundation for a suit in equity against him to compel his written assent, and thereby to perfect the void conveyance. But, by reason of his death, the plaintiff insists that he is entitled to require from the defendant a new conveyance, which, as a *feme-sole*, she is now competent to execute. In our opinion, however, the written assent of the husband is as indispensable to the validity of an executory agreement, by a married woman, to convey her real estate, as to an executed conveyance thereof. The restrictive clause of the section requiring the husband's written consent is as broad as that which confers the power to convey. It would be a preposterous construction to hold that a married woman might alone enter into a binding agreement to do that which she could not actually do without her husband's concurrence. * * * Upon what principle can it be maintained, that an instrument wholly void upon its execution is made valid and capable of enforcement in equity by the contingency of the husband's death? The deed, when executed, was inoperative for want of power on the part of the grantor. The removal of the disability of coverture cannot possibly render effectual and binding a contract or conveyance made while that disability continued, and by reason thereof originally a mere nullity. Whether the section under consideration be considered as one conferring a power not previously possessed by married women, but on condition of the husband's written consent, which is its form; or as a protective enactment requiring such written consent for the benefit and security of the wife's interests, which is its substance; in either view, its effect and construction must be the same. * * *. A court of equity has no more jurisdiction than a court of law to recognize and give

effect to instruments inoperative for want of compliance with a condition made by statute prerequisite to their validity." (*Townsley v. Chapin*, 12 *Allen's R.* 476, 478, 479, 480.) The principle settled in this case is an important one, and amply justifies the space given to the opinion of the court.

The assent in writing required by the statute of the husband of his wife's conveyance of her separate real estate which is not occupied by them as a homestead, is sufficiently shown by proof of a deed thereof signed and sealed by both of them, and containing these words: "In witness whereof I, the said 'married woman,' and B. my husband, in token of our release of all right and title of or to both dower and homestead in the granted premises, have hereunto set our hands and seals." (*Hills v. Bearse*, 9 *Allen's R.* 403.)

§ 511. Under the statute, it is observed that a married woman may, if she choose, keep her personal earnings to herself as her sole and separate property; but it has been held, nevertheless, that she may waive that right if she sees fit; and, in conformity with this holding, it was decided, that if a married woman buys articles of furniture for family use from time to time, paying for them partly with her own earnings, and partly with money furnished by her husband, and not discriminating or separating part of the property as her own from the rest, and there being nothing in the articles themselves to indicate that they were for her personal and exclusive use, it is *prima facie* evidence that the wife does not claim or have any separate title or exclusive right in any portion of them. (*Kelly v. Drew*, 12 *Allen's R.* 107.)

A *feme-covert* cannot sustain an action against partners, of whom her husband is one, to recover compensation for services performed for them. She cannot contract with her husband, and is not therefore able to contract with other parties jointly with him. (*Edwards v. Stevens*, 3 *Allen's R.* 315.) Neither can a married woman form a partnership with her husband, and she is not liable upon a promissory note given by a firm of which by partnership articles she and her husband have agreed to be members. (*Lord v. Parker*, 3 *Allen's R.* 127.) But a married woman may belong to a trading partnership, so as to be bound by a promissory note given in the partnership name, if her husband is not a member thereof. (*Plumer v. Lord*, 5 *Allen's R.* 460.)

It has been held that if a married woman who has joined in several deeds of her own estate, by her husband's request, and

allowed him to keep the money received therefor, afterward joins in another similar deed, in consideration of his executing to their daughter a note and mortgage for a larger sum than the amount received for the last conveyance, the mortgage will be valid, in the absence of any fraudulent intent in either of the parties to it. (*Brooks v. Dalrymple*, 12 *Allen's R.* 102.)

By the statute, a married woman is enabled to hold money and personal property within certain limits, and obtained in a particular way, but that is an exceptional case, and it is held that, notwithstanding the statute, personal property in the possession of the wife is to be presumed, in the absence of other evidence, to be the property of her husband. This was the rule of the common law, adopted and acted upon in the commonwealth, until the passage of the statute of 1855, chapter 304, enabling married women to have property in their own right and to their own use; and it is thought the statute does not vary this presumption of fact, and the party whose case requires him to prove property in the wife must therefore rebut such presumption, and show facts which bring it within the statute as a case in which the statute declares it to be the separate property of the wife. (*Commonwealth v. Williams*, 7 *Gray's R.* 337, 338.) The rule, as we have seen, has been declared to be different in the State of New York.

Money paid by a married woman before the statute of 1855, upon a bond to convey land to her, has been held to be *prima facie* the property of her husband, and may be recovered back by him on offering to surrender the bond. And, before the statute, the earnings of the personal labor of a wife, even when living apart from her husband, were his property, and might be recovered by him from one to whom she had assigned them without value. The statute, however, has now changed this common law rule. (*Casey v. Wiggin*, 8 *Gray's R.* 231. *McKavlin v. Breslin*, *Ib.* 177.)

If a married woman purchase personal property with her own means, or upon her own credit exclusively, and takes the conveyance to herself for her own use, the property becomes her separate property, and is not liable for her husband's debts, although in making the conveyance there is no express statement, in writing or otherwise, that it is to be held as her separate property. (*Spaulding v. Day*, 10 *Allen's R.* 96.)

§ 512. It is provided by statute that whenever any property shall be secured to any married woman, or conveyed, devised or

bequeathed to her, pursuant to the provisions of the statute, "such woman shall, in respect to all such property, have the same rights and powers, and be entitled to the same remedies in her own name, at law and in equity, and be liable to be sued at law and in equity upon any contract by her made, or any wrong by her done, in respect to such property, and also upon any contract by her made or wrong by her done before her marriage, in the same manner and with the same effect as if she was unmarried; and all such property may be attached in any such suit, and may be taken on execution, as if she held the same being unmarried."

The statute further provides, that if any married woman, holding property to her separate use by virtue of this act, shall die intestate, all her right and interest in any personal property thus held shall vest in the husband, unless other provision is made in relation thereto by the terms of the contracts or conveyances under which she holds; and that he shall be entitled to his estate by the curtesy in all lands and tenements held by his wife, as if the act had not been passed. (*Laws of 1845, ch. 208.*) Under this statute it has been held that a conveyance by a married woman, in which her husband does not join, of property held by her to her separate use by virtue of the statute, passes a valid title; subject only to the estate by the curtesy secured to the husband by the statute. (*Beal v. Warren, 2 Gray's R. 447.*)

A wife, by joining with her husband in a written contract with a mechanic for furnishing labor or materials for erecting a building on her land, does not thereby create a lien on her estate in the land for the amount due to the mechanic for such labor or materials, under the provisions of the statute which give a lien to mechanics and others for the cost of repairs and improvements on real estate; but if the husband and wife have a child born alive in such a case, the mechanic's lien will extend to the husband's estate in the land as tenant by the curtesy initiate. (*Kirby v. Tead, 13 Metcalf's R. 149.*)

§ 513. By an antenuptial contract between a man and his intended wife, such intended wife was to hold her property to her sole and separate use, and was to advance to the intended husband certain promissory notes owned by her; with the proceeds of which the husband was to redeem his mortgaged farm, and convey one half thereof to his intended wife, and have the use of such half so long as he should be a faithful husband to his intended wife; the

intended husband, however, even then had no legal right to redeem his farm, as the right to redeem it was wholly gone from him; whereupon the parties were married and the husband soon thereafter took the notes from his wife without her consent, and put them into the hands of his attorneys, to be collected for him; the wife petitioned the court to appoint a trustee to hold her separate property in trust for her, and the court appointed a trustee accordingly, and the wife immediately conveyed to such trustee all her separate property in trust according to the provisions of the statute; and the trustee then brought a bill in equity against the husband and his attorneys, praying that they might be required, by decree, to deliver said notes to him, and might be restrained from prosecuting actions against the makers of the notes, and from receiving any money due thereon: the court held that the trustee was entitled to a decree against the husband declaring the title of such trustee to the notes and the proceeds thereof; and also to a decree against the husband's attorneys, requiring them to account for and deliver over to the trustee the notes or the proceeds thereof, on payment of their legal costs and expenses for services and disbursements. (*Tinker v. Beach*, 11 *Metc. R.* 349.)

§ 514. By a recent statute of the general court, it is provided that any married woman doing or proposing to do business on her separate account shall file a certificate in the clerk's office of the city or town where she does or proposes to do business, setting forth the name of her husband, the nature of the business proposed to be done, and in case no such certificate shall be filed, such married woman is not allowed to claim any property employed in said business as against any creditors of her husband, but the same may be attached on mesne process by any such creditor or taken upon execution against the husband of such woman. (*Laws of 1862, ch. 198.*)

The language of this statute is broad and comprehensive, and includes property belonging to a married woman of every kind which is employed by her in carrying on business on her sole account. The object of the statute has been declared to be to afford the means of ascertaining in which of the two persons, the husband or wife, apparently in the possession and use of property in carrying on any kind of trade or occupation, the title is vested, so that all having occasion to transact business with either may regulate their dealings accordingly. It has, therefore, been held

that the statute applies to furniture used in a boarding-house kept by a married woman. (*Chapman v. Briggs*, 11 *Allen's R.* 546.)

§ 515. Under the statute of 1845, chapter 208, a married woman to whom real estate had been conveyed, without words expressing that it was to be held by her to her sole and separate use, could not make a valid conveyance thereof without her husband's joining as grantor; and a deed not so executed cannot be reformed in equity. (*Jewett v. Davis*, 10 *Allen's R.* 68. *Gerrish v. Mason*, 4 *Gray's R.* 432. *But vide Perkins v. Richardson*, 11 *Allen's R.* 538.) But in reference to the separate property of the wife which is held exclusively to her own use, and which she may, by virtue of a later statute, convey by her own deed, with the written assent of her husband, a different rule would apply, and she may be required specifically to perform her contract entered into with respect to such separate property. (*Vide Baker v. Hathaway*, 5 *Allen's R.* 103. *But vide Townsley v. Chapin*, 12 *ib.* 476.)

If a woman mortgages her land to secure a debt to a third person, her subsequent marriage to the mortgagor will not extinguish the mortgage; but after his death his legal representatives may enforce it. Nor will the appointment of the mortgagor as administrator of the estate of the third person have this effect, if no funds come into his hands which can be applied to the payment of the mortgage debt. In such case, the fact that during the marriage her husband undertook to foreclose the mortgage, and that he executed a will treating the mortgaged premises as his own, cannot legally prejudice her rights after his death. A married woman cannot during coverture be barred of her estate, held without any limitation to her sole and separate use, by an *estoppel in pais*. (*Bemis v. Call*, 10 *Allen's R.* 512.)

§ 516. There are three statutes bearing upon the question of the power of a *feme-covert* to bind herself by her contract, which essentially modify the marital rights of parties as they exist at common law, and greatly increase the rights and obligations of married women. By the statute of 1845 it is provided that a married woman may, upon certain prescribed terms and conditions, in pursuance of a written contract entered into between the parties before the solemnization of the marriage, hold the whole or any designated part of the real or personal estate of which she may be seised or possessed at the time of the marriage, to her sole and sepa-

rate use, free from the interference and control of her husband, and also may in like manner hold such as shall be conveyed or bequeathed to her afterward, to be held in like manner and for the same purpose. (*Laws of 1845, ch. 208, §§ 1, 2, 3.*) The statute of 1855 declares that all the real and personal property of any woman who shall thenceforward be married in the commonwealth, which she owns at the time of her marriage, or to which she afterward acquires a title by descent, devise or bequest, or by the gift of any person except her husband, shall be and remain her sole and separate property notwithstanding her marriage. (*Laws of 1855, ch. 304, § 1.*) The statute of 1857 goes still further, and declares not only that "the property, both real and personal, which any woman who may now be married in this commonwealth, may now own as her sole and separate property," but also that "any real or personal property which shall hereafter come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts." (*Laws of 1857, ch. 249, § 1.*) These statutes are all in derogation of the common law, and are not to be extended by construction. Hence, it has been held that no claim arises against a married woman for money paid by her request in reference to land of which, after her marriage, and before the passage of the act of 1855, referred to, she received a deed from her father in her own name, but with no provision therein that she should hold the land to her sole and separate use, or free from the interference or control of her husband. (*Smith v. Bird, 3 Allen's R. 34.*) It has, however, been held that a married woman who holds a bond with condition to convey land to her, to her sole and separate use, free from the interference and control of her husband, upon payment of a certain sum, is liable in an action at law, under the statutes of the commonwealth, upon a promissory note given by her for money borrowed to be applied and actually applied in payment of the amount necessary to secure to her the conveyance of the land, and also upon a promissory note given by her for money borrowed for the purpose of paying debts contracted by her for matters necessary for the carrying on of a farm, after she had received a deed therefor. (*Ames v. Foster, 3 Allen's R. 541.*)

Under the statute of 1857, a note made payable to a married woman is exempt from attachment by subsequent creditors of her

husband. (*Chapman v. Williams*, 13 *Gray's R.* 416. *But vide Woodcock v. Reed*, 5 *Allen's R.* 207.)

§ 517. A married woman who carries on the business of keeping boarders on her sole and separate account, and has purchased goods to be used in her business upon her sole credit, is liable therefor under the statute of 1855, although her husband lived with her at the time when the goods were purchased; and her own acts and admissions in reference to her business are competent evidence against her; but she is not liable on a note given by her in payment for goods originally sold and charged to her husband. (*Parker v. Simonds*, 1 *Allen's R.* 258.)

So a married woman is liable upon a note signed by her jointly with her husband in payment for lumber and materials sold and delivered upon land owned and held by her to her sole and separate use, and designed for and actually used in the repair of buildings standing thereon, she knowing all the facts; and also on notes given in renewal thereof. (*Parker v. Kane*, 1 *Allen's R.* 346.)

So, also, under the statutes in force, a mortgage of the land of a married woman held by her to her sole and separate use, executed without duress by her and her husband jointly, to secure a debt of her husband and a third person, is valid; and the fact that she signed a note for the same debt as surety for them is immaterial. And if a married woman has jointly with her husband executed a deed of land held by her to her sole and separate use, the effect of the words of grant in the early part of the deed is not controlled by a statement in the last clause that she signs in token of her release of dower. (*Bartlett v. Bartlett*, 1 *Allen's R.* 440.)

An indorsement of a draft by a husband to his wife, and her subsequent indorsement of it with his assent to a third person, are sufficient to vest in the latter a valid title. (*Slawson v. Loring*, 5 *Allen's R.* 340.)

A married woman who carries on the business of farming upon land for which she holds a bond for a deed, to her sole and separate use, is liable upon a promissory note given by her for money borrowed to enable her to pay for the land, and actually applied by her to that purpose. (*Chapman v. Foster*, 6 *Allen's R.* 136.) And a promissory note given by a married woman for land conveyed to her, to her sole and separate use, is valid under the statute. (*Stewart v. Jenkins*, 6 *Allen's R.* 300.)

§ 518. Under articles of agreement signed by a married woman, her husband, and several other persons, reciting that she and one of the others had taken a lease of certain manufacturing works, and providing that she shall furnish a certain amount of capital, at eight per cent, and that her husband shall devote his whole time to the business of manufacturing and selling the articles, and making special provisions as to the duties and rights of the others, and further providing that "she or her husband, as they two may decide or agree, shall receive one-half of the net profits of the concern;" the court held that the husband is a partner in the firm; and that therefore the wife is not a partner, and is not liable upon a promissory note given in the name of the firm. (*Plumer v. Lord*, 7 *Allen's R.* 481.)

A married woman is not liable for lumber purchased by and delivered to her prior to the enactment of the statute of 1857, chapter 249, to be used in making alterations and repairs on a building upon land held by her under a deed which contained no provision that she should hold the land to her sole and separate use, or free from the interference or control of her husband. (*Cram v. Kelley*, 7 *Allen's R.* 250.) But a married woman may be held liable under the statute of 1845, chapter 308, upon covenants contained in a deed of land in another state, held by her to her sole and separate use, and conveyed as the consideration of a deed of land in the State of Massachusetts, which was conveyed to her, to her sole and separate use, free from the interference or control of her husband; and it was held that the fact that her husband joined with her in the deed and covenants is immaterial. (*Basford v. Pearson*, 7 *Allen's R.* 504.)

A bill in equity lies to enforce payment out of the separate estate of a married woman, so far as she has the right of disposal thereof, of a bond given by her for the price of land conveyed to her sole and separate use, provided that no effectual remedy exists at law, and the creditor is not confined to collateral security held by him for the bond. In such case the bill need not set out any specific estate or property belonging to the defendant in her own right, but may allege generally, that she is possessed of property to her sole and separate use, and subject to her disposal, which is chargeable with the payment of the bond. (*Rogers v. Ward*, 8 *Allen's R.* 387.)

No further review of the cases which have arisen under the Massachusetts statutes respecting marital rights, and the powers and obligations of married women, is deemed necessary, as the foregoing seem to cover the whole ground, and embrace fully the doctrine of the courts upon the subject.

§ 519. In the State of Rhode Island, the statute provides that when any married woman coming into the state to reside, from another state or country, without her husband, he never having lived with her in the state, and shall continue to reside in the state without her husband, for the space of one year continuously, she may afterward, during her separate residence therein, transact business, make contracts, prosecute and defend suits in her own name, and dispose of such of her property which she may acquire by her own industry or otherwise. And she may make and execute any deeds and other instruments in her own name, and do all other lawful acts that may be necessary or proper to carry into effect the power granted to her. She will be liable to be sued as if she were unmarried, upon all contracts, and for all other acts made or done by her after the expiration of said term of one year. If her husband shall afterward come into the state and claim his marital rights, his arrival in the state will have the same effect with regard to any suit then pending in which she is a party, except to abate the same, and to any contract or business transacted by her under the power granted in these provisions, as if they had been first married at the time of his arrival, and no other effect. (*Rev. Stat.* 1857, *ch.* 135, §§ 1-5.)

§ 520. The real estate, chattels real, and personal estate, which are the property of a married woman before marriage, or which may become her property after marriage, or which may be acquired by her own industry, are so far secured to her sole and separate use that the same, and the rents, profits, and income thereof, shall not be liable to be attached or in any way taken for the debts of the husband, either before or after his death; and, upon the death of the husband in the life-time of the wife, will be and remain her sole and separate property. In case of the sale of any such property, the proceeds of the sale, or any part of the same, may be invested in the name of the wife in any property, and be secured to and holden by the wife in the same manner and with the same rights and effect as the property sold. The receipt or discharge of the husband for the rents and profits of such property will be a

sufficient receipt or discharge therefor, unless previous notice in writing be given by the wife to the lessee, debtor, or incorporated company, from whom such rents or profits are payable; in which case the sole and separate receipt or discharge of the wife will alone be a sufficient receipt and discharge therefor, and the receipt of the wife will in all cases be a sufficient discharge for the payment or delivery to her of her own property. (*Rev. Stat. ch. 136, §§ 1, 2, 3.*)

§ 521. The chattels real, household furniture, plate, jewels, stock or shares in the capital stock of any incorporated company, money on deposit in any savings bank or institution for savings, with the interest thereon, or debts secured by mortgage on property, which are the property of any woman before marriage, or which may become her property after marriage, cannot be sold, leased, or conveyed by the husband unless by deed, in which the wife must join as grantor, which deed is required to be acknowledged in the manner provided for the conveyance of the real estate of married women.

Any married woman is authorized by statute to sell and convey any of her personal estate, in the same manner as if she were single and unmarried; and to make contracts respecting the sale and conveyance thereof, with the same effect, and with the same rights, remedies and liabilities as if such contracts had been made before marriage; although this provision is not to be construed to authorize any married woman to transact business as a trader. Neither does this provision apply to the case of lands and tenements, or other real estate, held by the husband and wife, being of lawful age, in the right of the wife. Such real estate can only be conveyed by deed or other instrument in writing, signed, sealed and delivered by the husband and wife respectively. The wife in such cases must acknowledge the execution of the deed or other instrument upon a private examination apart from her husband. (*Rev. Stat. ch. 136, §§ 4-8.*)

§ 522. If any deed affecting the wife's dower right in the estate of her husband be executed by the attorney of the wife during the life of the husband, the letter of attorney must be executed and acknowledged with the same formalities as are required in the execution and acknowledgment of a deed by a husband and wife of an estate held in the right of the wife.

Any married woman of sane mind, and of twenty-one years of age and upward, may dispose of her real estate, or any portion

of the same, and, being of the age of eighteen years and upward, may dispose of her personal estate, or any portion of the same, by last will and testament, executed in the manner in which other wills are required to be executed for disposition of like property. The right of the husband in the real estate of the wife as tenant by the curtesy, and his right to administer without action upon her personal estate not disposed of by her last will and testament, are not impaired by these provisions of the statute; nor do these provisions authorize the husband to give unto, or settle any of his property upon his wife, in any other manner or with any other effect than is by general law allowed. (*Rev. Stat. ch. 136, §§ 9-13.*)

§ 523. The property secured to any married woman by these provisions of the statute is made liable to attachment or levy for her debts contracted before marriage, and for her liabilities on such contracts, as she is authorized to make under such provisions, under the same circumstances, and with the same effect, as if she had continued sole and unmarried. And it is declared that nothing in such provisions shall be construed to impair any lien or right of lien therein, or any remedy by law provided for the enforcement thereof. In all actions relating to the property of any married woman, secured to her by these provisions, the husband and wife must jointly sue and be sued, except in case a trustee of the same be appointed as provided by law, and except in actions upon such contracts as she is authorized to make in relation to her personal estate, the wife may sue and be sued alone. In case of recovery by any husband and wife, or wife, in any such action the amount recovered may be invested in the name of the wife, in any property, with the same rights and effect as if the same had remained in the possession of the wife, whether the right of action accrued before or after marriage; and all such actions and rights of action will survive the death of either husband or wife. (*Rev. Stat. ch. 136, §§ 14, 15, 16.*)

Real estate in the state belonging to, or coming or descending to any woman born in the United States, or who has been otherwise a citizen thereof, will, upon her death, notwithstanding her marriage with any alien and residence in a foreign country, descend to her lawful children of such marriage, if any, and their descendants in like manner and with like effect, as if such children or their descendants were native born or naturalized citizens of the United States. (*Rev. Stat. ch. 176, § 22.*)

§ 524. It has been held that in a suit by husband and wife to recover wages earned by the wife before marriage, the wife is not competent to testify in favor of her claim, her husband being a party and interested in the costs of the suit. (*Donnelly v. Smith*, 7 R. I. R. 12.)

It has been further held, that in trover for the note given on the purchase of the property of a married woman by the administrator of the wife against the purchaser, into whose hands it had got during the life of the wife, the act with respect to the wife under age joining with her husband in the sale of her estate, was not designed to prevent the succession of the wife's administrator to the note, and to give it to her heirs, but merely to designate that the same class of heirs under the ancestral clause of the statute of descents, should be entitled to the distribution of the proceeds of the note as would have inherited the real estate had it never been converted into personalty. (*Tillinghast, Administrator, v. Holbrook*, 7 R. I. R. 230.)

A married woman is not liable in covenant jointly with her husband, for the breach of a covenant against incumbrances, contained in the deed of the husband and wife, of her estate; and, in strict course, the plaintiff joining her in such action, must become nonsuit; although the court may allow the plaintiff in such a case to amend the writ and declaration by striking out the wife as a party defendant, and take judgment against the husband alone, *without costs*. (*Porter v. Bradley*, 7 R. I. R. 538.)

A married woman having separate property may purchase with it property from her husband, and, if the price paid by her be adequate to the value of her purchase, her title will be maintained against her husband's creditors, both at law and in equity. (*Steadman v. Wilbur*, 7 R. I. R. 481.)

A husband in the actual possession of the wife's real estate, no trustee of the same having been appointed under the "act concerning the property of married women," is, notwithstanding the provisions of said act, so far seised of her real estate that, when his interest in the same is sold under a decree against him for the enforcement of a mechanic's lien, the purchaser may maintain trespass and ejectment against the husband to recover possession of such estate. (*Martin v. Pepall*, 6 R. I. R. 92.)

A trustee of the property of a married woman, appointed by the court during her separation from her husband under the statute,

will at her request be removed, and the management of her property restored to her, if such request be made freely and without the coercion of her husband, and there be no equitable reason to the contrary. (*Johnson v. Snow*, 5 R. I. R. 72.)

Husband and wife must join in an action of replevin for property mortgaged to the wife before marriage, to recover her sole and separate debt, by the express provision of the "act concerning the property of married women." (*Waterman v. Matteson*, 4 R. I. R. 539.)

A married woman holding separate property under the married woman's act, is not to be viewed, as respects such property, as a *feme-sole*. A solicitor who has, at the request of a married woman, performed services and expended moneys in prosecuting a suit in equity relating to her separate leasehold property, cannot therefore sustain a suit in equity to obtain compensation and reimbursement out of that property. (*Cozzens v. Whitney*, 3 R. I. R. 79.)

§ 525. The courts of Rhode Island hold that although no form of words is necessary to create an estate to the sole and separate use of a woman as against her present or future husband, yet such words must be used in the language limiting the use, as clearly and unequivocally express the intent to exclude the marital rights of the husband, and does not leave that intent a matter of doubt and speculation. Upon this principle, it was held that when the guardian and brother of a *feme-sole*, who was under age and contracted to be married, at her request, purchased an estate with her money, and took a deed to himself in fee, described therein as her guardian, *habendum* "to him, his heirs forever, to and for the only proper use, benefit and behoof" of his ward, "her heirs and assigns forever," and the covenants of warranty for quiet enjoyment ran to him, "his heirs and assigns, to and for the sole use, benefit and behoof of her, her heirs and assigns," these words, merely, did not create a trust for the sole and separate use of the ward, but, there being nothing for the guardian to do under the provisions of the deed, the statute of uses transferred the legal title to the ward, so as to admit her husband to curtesy in her estate. (*Nightingale v. Hidden*, 2 Am. Law Reg. [N. S.] § 443. S. C. 7 R. I. R. 115.)

§ 526. In the State of Connecticut, it is declared by statute that all real estate conveyed to the wife during coverture, paid for by her means or by money earned by her personal service, shall

belong to her to her sole use; and all the proceeds of her real estate are also hers, in equity, and are exempt from her husband's debts; and all personal property coming to the wife during the abandonment of her by her husband, or during their separation, from the abuse or intemperance of the husband, is declared to belong to the wife, and, by reason of such abandonment or separation, the husband loses all control over all of his wife's property. Personal estate coming to the husband in the right of the wife, or through her as the meritorious cause, is held by him as the trustee of the wife for her use, excepting so far as he may have paid her antenuptial debts, and he may be required to give bonds as such trustee, and for reasonable cause he may be removed and another appointed in his place. During the time of the abandonment of the wife by the husband, she may act as her own trustee, and, after the same has continued three years, she may, with the leave of the court, execute deeds of her real estate, without the concurrence of her husband. The interest of the husband in his wife's real estate is not liable for the husband's debts during the life of the wife or that of her children. Payments made to married women of money by her deposited with, or loaned to, any person, or corporation, or of money earned by her personal services, during coverture, will be valid payments, and her receipt for the same will have the same effect as the receipt of a *feme-sole*. (*Gen. Stat.* 1866, *tit.* 13, *ch.* 2.)

§ 527. The courts of the state hold that statutes are not to be so construed as to have a retrospective effect, unless such construction be required in the most explicit terms; the presumption being that they are to operate prospectively, and not to impair vested rights. Therefore, the statute relating to the domestic relations, providing for the conveyance of real estate to the wife during coverture, is held applicable to conveyances subsequently made, and contains no express allusion to those previously made; and hence is not retrospective. (*Plumb v. Sawyer*, 21 *Conn. R.* 351.)

The act provides that when the real estate of a married woman is sold, and the avails are "secured or invested in her name," the same shall in equity belong to her. Where a note was taken in the name of the wife for the price of her land sold, it was held that the avails of the sale were *secured and invested* in her name within the meaning of the statute. And where money received by the wife for her real estate sold was deposited by her in her own name in bank, it was held to be *invested* within the meaning of

the statute. If the money so deposited could not be regarded as invested, it would be considered as still in the possession of the wife, deposited for safe keeping to await an investment. So where railroad bonds were taken in the name of the wife for her real estate sold, and after the wife's death the husband received the interest upon them, it was held that the bonds belonged to her estate, and that the estate of the husband was liable to her representatives for the interest so received. And where a note was made payable to the wife for the price of her land sold, and afterward the maker had done work on buildings³⁴ belonging to the wife, under an agreement with herself and her husband that this bill of work should be indorsed on the note as part payment of it, which, however, was not done, and the note was kept by the husband until his death, and was always claimed by him, it was held that the note was the property of the wife, but that the bill of work ought to be applied in part payment of it. (*Jennings v. Davis*, 31 Conn. R. 134.)

The act of 1860 provides that money or other property acquired by a married woman during coverture by her personal services, shall be held by her to her sole and separate use. Under this act, money due for her services is protected as hers, in the same manner as if the money had been received. Where, therefore, a suit was brought by the husband and wife for the recovery of money due for her personal services, it was held that a claim against the husband could not be set off by the defendant. (*Whiting v. Beckwith*, 31 Conn. R. 596. And vide *Sherwood v. Sherwood*, 32 *ib.* 1.)

CHAPTER XXXV.

THE STATUTORY POLICY OF THE STATES OF NEW JERSEY, PENNSYLVANIA, DELAWARE AND MARYLAND IN RESPECT TO MARRIED WOMEN AND MARITAL RIGHTS—LAWS OF SUCH STATES RESPECTIVELY—JUDICIAL CONSTRUCTION AND DECISIONS.

§ 528. By the statutes of New Jersey, the real and personal property of any female, which she shall own at the time of her marriage, and the rents, issues and profits thereof, are declared not to be subject to the disposal of her husband, nor liable for his debts,

and will continue her sole and separate property, as if she were a single woman; and the real and personal property, and the rents, issues and profits thereof, of any female now married, irrespective of the date of her marriage, will not be subject to the disposal of her husband, but will be her sole and separate property, as if she were a single female. And it is made lawful for any married female to receive by gift, grant, descent, devise or bequest, and hold to her separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same are declared not to be subject to the disposal of her husband, nor liable for his debts; and it is provided that all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place. (*Laws of 1851, p. 34, and Laws of 1852, p. 407. Elmer's Dig. 1855, p. 466, and Laws of 1866, ch. 294.*)

It is further provided by statute, that in any deed made by any married woman of full age, who joins with her husband in executing said deed, of any lands or any estate therein, it shall be lawful for her to enter into any covenant as to title of the land conveyed, or intended to be conveyed, or against incumbrances thereon, or warranting the same, and such covenants will have the same force and effect against her and all persons claiming by, through or under her, as if she were a *feme-sole* and unmarried. (*Laws of 1857, ch. 189.*)

By a recent statute, it is made lawful for any married woman to cause suit to be brought in any court of record in the state, for the redress of any wrong she may have suffered, or may hereafter suffer, or for the recovery of any right withheld from her, and for that purpose to cause the name of her husband to be joined with her own in said suit or action, though without his consent; but if she commence her suit without the consent of her husband, she is required to file certain freehold security specified in the statute. This provision of the statute, authorizing such actions, is declared not to apply to actions brought by married women living separate from their husbands, through abandonment or otherwise. It is made unlawful for the husband in any such action to control, discontinue, release, or in any way interfere with the same, but the action is to proceed, and be under the control and discretion of such married woman, as if she were a *feme-sole*. (*Laws of 1867, ch. 444.*)

§ 529. Under the statute of 1852, for the better securing the property of married women, a married woman can receive to her sole use a deed for lands for a term of years. When such a deed expresses on its face that the consideration was paid by the wife, the presumption is held to be that the consideration was her own money. The creditors of the husband under judgment and execution against him upon a cause of action arising anterior to the deed, cannot get a title at law, as against the wife, so as to maintain ejectment against the husband and wife, nor turn her out of possession. The whole legal title remains in the wife by force of the statute, even if the consideration money of the deed was the property of the husband. The court held in the same case, that the earnings of the wife, upon express promise to pay her, belong to her, and not to her husband, until he does some act with intent to reduce them into possession; and if with such proceeds she buys land, and the deed is made to her before the conversion by the husband, the land belongs to her, and cannot be seized and sold by his creditors under judgment against him; and the husband is not obliged to, nor is he guilty of any fraud against creditors, if he does not convert to his or their use the earnings of the wife. (*Stall v. Fulton*, 3 *N. J. Law R.* 430.)

But when a married woman, with the consent of her husband, contracted for the purchase of a lot of land, which was afterward conveyed to the husband, who paid the purchase-money and erected a house on the lot, part of the cost of which was paid by the husband, and the balance was secured by his bond and mortgage on the premises, which was afterward paid by the wife by money from her own earnings; the court of errors and appeals held, that these circumstances fail to establish any resulting trust in the wife, or show any interest in the property in the wife paramount to the title of the husband. The court also held in the same case, that by the common law, the earnings of the wife by the product of her skill and labor belong to the husband; and that they do not become the property of the wife even in equity, without a clear, express, irrevocable gift, or some distinct affirmative act of the husband divesting himself of them or setting them apart for her separate use. (*Skillman v. Skillman*, 15 *N. J. Eq. R.* 478.) A married woman cannot execute a deed without the consent of her husband; the separate examination and acknowledgment directed by statute, only remove her absolute incapacity to execute a deed,

and do not change the principle that requires the consent of her husband. (*Deer v. Lawshee*, 4 *Zabriskie's R.* 613.) And the agreement of a *feme-covert*, with the *assent* of her husband, for the sale of her real estate, is absolutely void at law, and courts of equity never enforce such a contract against her. (*Wooden v. Morris*, 2 *Green's Ch. R.* 65.) But it has been held in New Jersey, that a *feme-covert* is regarded in equity as a *feme-sole*, in respect to her separate estate, so far as to enable her to dispose of it in any way not inconsistent with the terms of the instrument under which she holds it. (*Leaycraft v. Hedden*, 3 *Green's Ch. R.* 512.)

§ 530. A married woman, owning real estate by devise from her father, obtained an injunction against a purchaser of the real estate under execution against her husband, restraining him from proceeding with a suit at law to recover the possession of the property. On a motion to dissolve this injunction, it was held by the court of chancery, that as the wife's claim to protection was founded on her allegation that by her father's will the real estate was devised to her sole and separate use, and that her husband had no estate in the land which could be the subject of a levy and sale at law; if that be so the wife has a valid and complete defense at law, and there is no need of the intervention of the court of chancery to protect her interest. The claim of the wife that if the purchaser under the execution be permitted to proceed with his suit, it would result in defeating the intention of the testator as to his widow, by depriving her of the home which by the will he directed she should enjoy with his daughter on the premises in question, cannot avail her in the suit in chancery. So far as these considerations establish any legal right in the widow, they are available only in her behalf and at her instance. The complainant cannot by her bill enforce the legal or equitable rights of another. (*Emery v. Vansickel*, 15 *N. J. Eq. R.* 144.)

The husband is a necessary party to a bill filed by the grantee of the husband against the wife for the partition of lands alleged to have been held by the husband and wife as tenants in common. The wife can only defend the suit jointly with her husband, except under special circumstances. A wife, though living separate from her husband, even though she has been separated by deed, cannot be sued alone; her husband must be joined if only for conformity. (*McDermott v. French*, 15 *N. J. Eq. R.* 78.)

In an action against husband and wife, if there be apprehension on the part of the wife that her husband will not make a proper defense for her, leave will be granted to her to answer separately from her husband. (*Robbins v. Abrahams*, 1 *Halstead's Ch. R.* 51.)

§ 531. Liabilities voluntarily incurred by a married woman will be charged upon her separate estate, but she cannot by her contract make herself personally liable.

The act of 1857, which provides that a *feme-covert* may covenant as to the title of her lands, affords the strongest legislative construction that the act of 1852 does not by necessary implication confer upon her the right to dispose of her real estate, or to make contracts in regard to it. A contract entered into by a married woman for the sale of her estate cannot be enforced; but equity will charge her separate property with the repayment of money advanced to the wife, at her instance and for her benefit, or on account of her estate. (*Pentz v. Simonson*, 13 *N. J. Ch. R.* 232. *Leaycraft v. Hedden*, 3 *Green's Ch. R.* 512.)

When the title to land is in a married woman as her separate property, she and her husband living separate, and money is paid and advanced at her instance and for her benefit, a mortgage executed by her alone to secure such advances will be a valid and equitable lien on such property. (*Wilson v. Brown*, 13 *N. J. Ch. R.* 277.)

It has been held that the act of March, 1852, does not authorize women previously married to convey real estate, conveyed to them subsequently to the passage of the act. (*Naylor v. Field*, 5 *Dutch. R.* 287.)

§ 532. In the State of Pennsylvania it is provided by statute that every species and description of property, whether consisting of real, personal, or mixed, which may be owned by or belong to any single woman, shall continue to be the property of such woman, as fully after her marriage as before; and all such property, of whatever name or kind, which shall accrue to any married woman during coverture, by will, descent, deed of conveyance or otherwise, shall be owned, used and enjoyed by such married woman as her own separate property; and the said property, whether owned by her before marriage or which shall accrue to her afterward, is declared not to be subject to levy and execution for the debts or liabilities of her husband during the life of the wife, and the same cannot be sold, conveyed, mortgaged or transferred, except by a

deed or conveyance duly executed by the wife in which her husband shall join. But it is expressly declared that no property of a married woman shall be protected by the statute from liability for debts contracted by herself or in her name by any person authorized so to do, or from levy and execution on any judgment that may be recovered against a husband for the torts of the wife: in which cases execution must be first had against the property of the wife, and in no case is the husband liable for the debts of the wife contracted before marriage. (*Laws of 1848*, 536, § 6, *as applied by Laws of 1850*, 553, § 20, *and Laws of 1856*, 315, § 1.)

This act enables a married woman to hold property, but not as a *feme-sole*, but rather in effect as though it was settled upon her as a *feme-covert*. (*Bear's Administrator v. Bear*, 33 *Penn. R.* 525. *Pettitt v. Fritz's Executor*, *Ib.* 118. *Pennsylvania Company v. Foster*, 35 *ib.* 134. *Walker v. Reamy*, 36 *ib.* 410. *Wright v. Brown*, 44 *ib.* 224. *But vide Cumming's appeal*, 11 *ib.* 272. *Goodyear v. Rumbaugh*, 13 *ib.* 480.)

When real estate is paid for with the earnings or savings of the wife, this does not give her a separate estate in the property purchased. The act does not change the common law rule that the husband is absolutely entitled to the earnings and services of his wife during coverture. (*Raybold v. Raybold*, 20 *Penn. R.* 308.) Neither can the wife acquire and hold property as against the creditors of the husband by carrying on a business or trade in her own name, while cohabiting with her husband, with capital loaned to her for that purpose. In such a case the husband is regarded as the actual owner of the goods employed in the business, and entitled to the proceeds of the skill and labor of his wife. (*Hallowell v. Horter*, 35 *Penn. R.* 375.)

The statute is designed to protect the interest of the wife in her separate property, both as respects the title and the possession; and it has been held that when the husband and wife are in the joint possession of the wife's property, a purchaser at sheriff's sale of the husband's interest cannot recover possession in an action of ejectment against the husband. (*McElfatrick v. Hicks*, 20 *Penn. R.* 402.) And the provisions of the act do not require of the wife that she shall use and possess her separate property exclusive of her husband, or lose the benefit of the statute. If this were the rule, the act would ordinarily be of little or no protection to the wife, and the law cannot be so construed. (*Manderbach v.*

Mock, 29 *Penn. R.* 43. *Hoar v. Axe*, 22 *ib.* 381. *Barncord v. Kuhn*, 36 *ib.* 383. *Walker v. Reamy*, *Ib.* 410.)

§ 533. When property is claimed by a married woman as against the creditors of her husband, she is required to show, by evidence clear and conclusive, either that she owned the property at the time of her marriage, or else acquired it afterward in some of the ways provided for by the statute ; and if she claims that she got title to the property by purchase after her marriage, the burden is upon her to prove distinctly and clearly that it was paid for with funds which did not belong to her husband. (*Walker v. Reamy*, *supra*. *Gamber v. Gamber*, 18 *Penn. R.* 366. *Raybold v. Raybold*, 20 *ib.* 311.) Unless the proof is clear and satisfactory that the property thus purchased by a *feme-covert* was paid for out of her separate estate, the presumption of law is that it was paid for out of means furnished by the husband ; and this rule applies as well to purchases of real as of personal property. (*Flick v. Devins*, 50 *Penn. R.* 266. *Keeney v. Good*, 21 *ib.* 349. *Bradford's appeal*, 29 *ib.* 513. *Topley v. Topley's Administrator*, 31 *ib.* 328. *Auble's Administrator*, 35 *ib.* 261.) For example, when a testator, having directed his executor to sell his stock of goods and real estate, and, after payment of his debts and specific legacies, to divide the residue between his brother and sister, a married woman, who took the goods at the appraisement from the administrator, agreeing therefor to pay the testator's debts, in amount greater than the value of the goods, and kept store, the husband living in the house and assisting in the business, the court held that, as the goods were purchased on credit, and the stock kept up by the wife with the assent of the husband, this did not in effect constitute her a separate owner, and make the property hers under the provisions of the married woman's act, and reiterated the rule that when a married woman acquires property by purchase, she must clearly show that the purchase-money was her own, in some way within the recognition and protection of the act of 1848, as the law *presumes* it to have belonged to her husband. (*Hoffman v. Toner*, 49 *Penn. R.* 231.) But it has been held that this rule is not applicable when the action is brought by the wife against a mere trespasser. (*Hoar v. Axe*, *supra*.) Since the act of 1848, when money is received by the husband from his wife's separate estate, ostensibly for her use, and without an attending promise of repayment on his part, his subsequent bond to secure his wife for the

money, made to her trustee, will be sustained against the creditors of the husband. But a bond given by the husband to his wife's trustee for moneys reduced to the husband's possession before the married woman's act of 1848, would be without valid consideration and void as to the creditors of the husband. (*Ecker's Administrator v. Martin*, 50 Penn. R. 138.)

The statute of 1848 does not authorize the wife to convey her real estate, except by a deed or conveyance in which her husband is joined; and the form of the acknowledgment has not been changed by the act. (*Peck v. Ward*, 18 Penn. R. 506. *Thorndell v. Morrison*, 25 ib. 326. *Haines v. Ellis*, 24 ib. 253. *Shinn v. Holmes*, 25 ib. 142.) It has even been held that a married woman's separate deed to release her dower is void. (*Ulp v. Campbell*, 19 Penn. R. 361.) The statute does not empower the wife, while cohabiting with her husband, to execute an obligation for the payment of money, or the performance of any other act, except it be to agree to pay for the improvement of her separate estate. (*Caldwell v. Walters*, 18 Penn. R. 82.) Neither does the law authorize her under such circumstances to enter into a valid recognizance as bail for her husband. The plea of coverture is a perfect defense to such an instrument. (*Bennet v. Smith*, 3 Am. Law Jour. 138.) The wife, however, may bind her separate estate for the payment of her husband's debts, and she may assign her interest in her deceased father's residuary estate, to recover the debts of her husband, though she cannot legally bind her separate property to pay the expenses of collecting a debt against her husband. (*Magaw v. Stevenson*, 1 Grant's Cases, 402. *Lytle's appeal*, 36 Penn. R. 131.)

The provisions of the married woman's act of 1848 do not confer upon the wife any new power to contract debts, with the privilege of being sued for them. The debts referred to in the statute for which her separate property is liable to be taken on execution, are those from which the husband is exempted from liability. (*Glyde v. Keistler*, 32 Penn. R. 85. *Bear's Administrator v. Bear*, 33 ib. 529.) The wife, however, is permitted, as before intimated, to contract debts for the improvement of her separate estate, and for debts contracted for that purpose her separate property can be made liable. But it has been held that she can avoid a debt contracted for the avowed purpose of improving her separate estate; it must be made to appear that the money was actually used for that object. (*Mahon v. Gormley*, 24 Penn. R. 80. *Hough v. Jones*, 32

ib. 432. *Murray v. Keyes*, 35 *ib.* 384.) If the courts adhere strictly to this rule, it behooves those dealing with married women to be careful to see not only that their advances made to them are for the proper objects, but that they are actually appropriated to such objects.

Where a *feme-covert* executed a mortgage of her separate estate to secure the debt of her husband, it was determined that she might waive the limitation provided by the act of 1705, and agree that a writ of *scire-facias* may issue at once on default of payment of the mortgage debt. (*Black v. Galway*, 24 *Penn. R.* 18. *Patterson v. Robinson*, 25 *ib.* 82.)

§ 534. By the statute, a married woman may dispose, by her last will and testament, of her separate property, real, personal, or mixed, whether the same accrues to her before or during coverture, although her last will and testament must be executed by her, in order to be valid, in the presence of two or more witnesses, neither of whom must be her husband. (*Laws of 1848*, 536, § 7.)

It has been determined and held by the courts of New York, that this power conferred upon married women to dispose of their separate property by will is a general one, and not limited to property acquired subsequently to the passage of the act. They may dispose of their entire property by a will properly executed, whether such property was acquired before or during coverture. The statute removes a disability, and therefore the power to devise is not limited to subsequently acquired property. (*Van Wert v. Benedict*, 1 *Brad. R.* 114.) This decision, though pronounced in New York, is good authority upon this subject in Pennsylvania.

The provision of the married woman's act of 1848, giving power to a *feme-covert* to make a will, does not prevent the will of a *feme-sole* from being revoked by her subsequent marriage. The act simply removes the disability by reason of coverture to make a will, but in no way affects other statutory regulations relating to the consequence resulting from marriage. (*Fransen's will*, 26 *Penn. R.* 202.)

The power of a *feme-covert* to bequeath or devise her property is restricted, as regards her husband, to the same extent as the husband's power so to dispose of his property is restricted, as regards the wife, namely, so that any surviving husband may, against her will, elect to take such share and interest in her real and personal estate as she can, when surviving, elect to take against his will in

his estates, or otherwise to take only her real estate as tenant by the curtesy; though this provision is not to affect the right or power of the wife, by virtue of any authority or appointment contained in any deed or will, to grant, bequeath or devise any property held in trust for her sole and separate use. (*Laws of 1855*, 430, § 1.)

The first impression of the courts, in the construction of the act of 1848, was that it made a radical change in the condition of a *feme-covert*, and gave her, in all respects that concerned her property, the full rights and privileges of a *feme-sole*, and there are *dicta* to that effect. (*Cummings' appeal*, 11 *Penn. R.* 272. *Goodyear v. Rumbaugh*, 13 *ib.* 480. *Sheidel v. Weishlee*, 16 *ib.* 138.) The subsequent cases, however, have not been disposed, as we have seen, to give the act so wide a scope, and have been adverse to a married woman's possession of many powers claimed for her under it. (3 *Am. Law Reg.* [*N. S.*] 534.)

§ 535. Whenever the property of a married woman is secured to her by the statute of 1848, and she shall have no trustee for the same, it is made lawful for her to apply to the court of common pleas of the county where she was domiciled at the time of her marriage, for the appointment of a trustee of the same, and such court is required to appoint a trustee of the same, not being the husband of the petitioner; and it is further lawful for any such married woman to declare a trust in regard to such property or any part thereof, in favor of any of her children. (*Laws of 1850*, p. 569, § 11.)

The courts hold that this provision of the statute does not authorize the appointment of a trustee to take charge of the property of a married woman, which she owned prior to the passage of the act of 1848, to the exclusion of her husband. (*Burton's appeal*, 22 *Penn. R.* 164.)

Any suit or suits at law to be commenced in any of the courts of the commonwealth, touching or concerning, or for the recovery of any property, real, personal or mixed, belonging or secured to any married woman, by virtue of the provisions of the act relating to the rights of married women, passed the 11th of April, 1848, may be brought in the names of such married woman and her husband to the use of the said married woman; and a recovery in such suit or suits will be for the exclusive benefit of such married woman. (*Laws of 1850*, p. 569, § 39.)

Before the passage of the act of 1850, it had been decided by the courts, that an action for the recovery of the separate property of a married woman, or for any matter concerning it, might be prosecuted in the joint names of the husband and wife, or that the wife might bring the action in her own name alone, as circumstances might require. (*Goodyear v. Rumbaugh*, 13 Penn. R. 480. *Sheidel v. Weishlee*, 16 *ib.* 134.)

It was the impression in the first place, that the act of 1850 authorized, but did not enjoin the action concerning the wife's separate estate, to be brought by both husband and wife. But the courts have held, that the action should be brought in the names of both, to the use of the wife. (*Kennedy v. Good*, 21 Penn. R. 349.) It was subsequently declared in unqualified terms, that the act of 1850 took away the right of the wife to bring her separate action. (*Ritter v. Ritter*, 31 Penn. R. 396.)

§ 536. In all cases where debts may be contracted for necessaries, for the support and maintenance of the family of any married woman, it is made lawful for the creditor, in such case, to institute suit against the husband and wife for the price of such necessaries, and, after obtaining a judgment, have an execution against the husband alone; and, if no property of the husband be found, the officer executing the writ must so return, and thereupon an alias execution may be issued, which may be levied upon and satisfied out of the separate property of the wife, secured to her under the provisions of the first section of the act of 11th April, 1848, with the condition, however, that judgment cannot be rendered against the wife in such joint action, unless it shall have been proved that the debt sued for in such action was contracted by the wife, or incurred for articles necessary for the support of the family of the said husband and wife. (*Laws of 1848*, 536, § 8. *Purden's Dig.* p. 700, § 13.)

An action cannot be sustained against a married woman under this provision of the statute for necessaries furnished for the support or maintenance of her family previous to the passage of the act. (*Headley v. Ettling*, 1 *Phila. R.* 39.) And in all cases it must appear that the articles furnished were actually necessary for the support and maintenance of the family of the wife, and the question of family necessities, like that of necessaries in general, is a question for the jury, to be determined from the circumstances of the particular case. (*Parke v. Kleber*, 37 Penn. R. 251. *S. C.*

8 *Pittsburg Leg. Jour.* 170.) So, also, in order to sustain the action against the wife in such a case, it is incumbent upon the plaintiff to aver and prove, not only that the debt was incurred for family necessities, but that the same was contracted by the wife herself; otherwise the plea of coverture is a good defense, and will defeat the action. (*Murray v. Keyes*, 35 *Penn. R.* 384. *Parke v. Kleber*, 37 *Penn. R.* 251.)

§ 537. Whenever any husband, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his wife, or shall desert her, the statute confers upon her all the rights and privileges secured to a *feme-sole* trader, under the act of the 22d of February, 1718, entitled "An act concerning *feme-sole* traders," and she is made subject as therein provided, and her property, real and personal, howsoever acquired, is made subject to her free and absolute disposal during life, or by will, without any liability to be interfered with or be obtained by her husband, and, in case of her intestacy, her property will go to her next of kin, as if her husband were previously dead. But in order that creditors, purchasers and others may with certainty and safety transact business with a married woman under such circumstances, she may present her petition to the court of common pleas of the proper county, setting forth under affidavit the facts which authorize her to act as aforesaid, and, if sustained by the testimony of at least two respectable witnesses, and the court be satisfied of the justice and propriety of the application, such court may, upon such notice as it may direct, make a decree and grant her a certificate, that she shall be authorized to act, have the power and transact business as before stated; and such certificate is made conclusive evidence of her authority, until revoked by such court for any failure on her part to perform the duties by the act made incumbent upon her.

The statute further declares that no husband who shall have for one year or upward previous to the death of his wife, willfully neglected or refused to provide for his wife, or shall have for that period or upward willfully and maliciously deserted her, shall have the right to claim any right or title in her real or personal estate, after her decease, as tenant by the curtesy or under the intestate laws of the commonwealth. (*Laws of 1855*, 430, §§ 2; 4, 5.)

Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in without cause. (*Ingersoll v. Ingersoll*, 49 *Penn. R.* 249.)

The act of 1718 referred to gives a *feme-sole* trader the capacity to sue and be sued without joining her husband. But a married woman is not liable to be sued as a *feme-sole* trader under the act of 1855, unless she has been so decreed by the court under the provisions of the act. (*Hyde v. Hesser*, 16 *Leg. Inst.* 364. *Cord's Rights of Married Women*, 667, note 1.)

§ 538. Whensoever any husband shall have deserted or separated himself from his wife, or neglected or refused to support her, or she shall have been divorced from his bed and board, it is made lawful by statute for her to protect her reputation by an action to recover for slander or libel; and she is also given the right by action to recover her separate earnings or property, with the condition, however, that if her husband be the defendant, the action must be prosecuted in the name of a next friend. (*Laws of 1856*, 315, § 3.) It will be observed that by the provisions of this statute the right is not *expressly* given to the wife to prosecute an action against her husband for the protection of her reputation against his slander or libel, and yet the right is *implied* by the *proviso* requiring the action to be in the name of a next friend when the husband may be the defendant. By the New York statute it is provided that a married woman "may bring and maintain an action in her own name for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole;" and we have seen that under that statute a married woman cannot sue her husband for an assault and battery, slander or libel. (*Ante*, § 475.) It was there admitted that the right of the wife to sue in such a case was covered by the literal language of the statute, but it was thought not to be justified, because it was contrary to the policy of the law, and destructive of that conjugal union and tranquillity which it has always been the object of the law to guard and protect. But in this case we have not only the general language of the act, but the proviso declaring in what way the action must be brought in the contingency that the husband is the defendant. It is quite clear, therefore, that under the Pennsylvania act the wife will be permitted to bring her action against her husband in the circumstances supposed by the statute.

But it has been expressly held by the courts, that neither the married woman's act of 1848, nor any of its supplements, empowers the wife, by her next friend or otherwise, to maintain an action of debt against her husband, on a contract made during coverture.

(*Ritter v. Ritter*, 31 *Penn. R.* 396.) And it has been further held, that a married woman can neither sue nor be sued on her contract made during coverture. But an action may be brought by or against her upon her *antenuptial* contract, though in such action she must be joined with her husband. (*Williams v. Coward*, 1 *Grant's Cases*, 21. *Hertzog v. Hertzog*, 29 *Penn. R.* 465.)

§ 539. It is made lawful by statute for married women to loan to their husbands moneys, being of the separate estate of the wife, and to take in security therefor a judgment or mortgage against the estate of the husband, in the name of a third person, who will act as trustee for such married woman; and any such security taken *bona fide* to secure such loan or moneys received by the husband from the proceeds of the real or personal estate of the wife, is declared to be as good and valid in law against the estate of the husband as though the same had been invested by a trustee appointed by the court. (*Laws of 1851*, 669, § 22.)

A husband may effect an insurance upon his own life for the benefit of his wife, and, when the policy is effected without fraud, and on its face it appears to have been taken for the benefit of the wife, and payable to her, it will be upheld. But the assignment of a policy of life insurance by a debtor who is insolvent when insured, in trust for the benefit of his wife, was held to be fraudulent and void as to creditors. (*Elliott's Executor's appeal*, 50 *Penn. R.* 75.)

§ 540. Whenever any married woman of lawful age shall be entitled to a legacy, or to a distributive share of the personal estate, or of the proceeds of the real estate of a deceased person, it is made competent for her, either in person or by attorney, to sign, seal and deliver a refunding bond, in pursuance of the act of the assembly in such case made and provided, and also to execute all such other instruments, and to perform all such other acts as may by law be necessary to be done, or may be lawfully required by the executor or administrator, upon the payment to her of the moneys to be distributed as aforesaid, with the same effect, for the intent and purpose of binding her separate estate, as if she were sole and unmarried. (*Laws of 1856*, 315, § 4.)

The courts of the state may permit married women to be incorporated with others, in any institution composed of women, or to be under their management, for the care and education of children, or for the support of sick or indigent women. (*Laws of 1859*, 78, § 1.)

There are some other statutory peculiarities relating to marital rights in Pennsylvania, having reference principally to the rule of descent and distribution in cases of intestacy and the like, but none so distinguishing as to make it appropriate to dwell upon them in this place. The various statutes themselves in these instances will need to be consulted as cases respectively arise.

§ 541. There have been some quite interesting points recently settled by the courts under the legislation of the State of Pennsylvania respecting the rights and powers of married women, a reference to which will close the discussion for this commonwealth under this head.

In general terms it may be affirmed that the married woman's acts are none of them intended to affect the vested rights of a husband, and do not protect those rights, such as they may be, for the wife's benefit, against the claims of the creditors of the husband. (*Vide Lancaster Bank v. Stauffer*, 10 *Barr's R.* 398. *Lefevre v. Witmer*, *Ib.* 505. *Boose's Appeal*, 18 *Penn. R.* 392. *Peck v. Ward*, *Ib.* 509. *Stehman v. Huber*, 21 *ib.* 260. *Burson's appeal*, 22 *ib.* 164. *Bachman v. Chrisman*, 23 *ib.* 162.)

A married woman in Pennsylvania has no capacity to contract for the sale of her land or to convey it, except in the precise statutory mode. At law, *femes-covert* have no capacity to make contracts. Their contracts are nullities, and in this respect equity follows the law. Of course this does not apply to those cases where the statute expressly empowers them to contract. A married woman's power to convey her land is derived from the act of 1770, and in regard to powers in their nature statutable, equity follows the law, however meritorious the consideration. Equity will not aid defects which are of the essence of the power, nor supply any circumstance for want of which the legislature has declared the instrument void.

The contract of a married woman being void, it cannot be ratified unless by deed in the mode prescribed by the statute. Positive acts of encouragement which might operate to estop one *sui juris*, will not affect one under legal disability; and a wife can do or forbear to do no act to affect her property, unless settled to her separate use.

A married woman, by agreement signed only by herself and without an acknowledgment, contracted to sell land; she received one year's interest and a small part of the purchase-money. The

purchaser took possession, and made improvements with her knowledge and encouragement. Under the rules above suggested, the court held that neither the principle of estoppel nor compensation would prevent her recovering the land. (*Glidden v. Strupler*, 6 *Am. Law Reg.* [N. S.] 635, 636. *S. C.* 52 *Penn. R.* 400.)

A husband may, without the intervention of a trustee, settle upon his wife a reasonable portion of his estate, if it be not done in contemplation of future indebtedness, and he be free from debt or perfectly solvent after payment of all existing debts; but the settlement must be in such form as to place the gift within her power and under her control. Upon such a settlement no legal presumption of fraud arises, but the question is one of fact for the jury as to the intention of the parties. Where a settlement by a husband was made in another state by permitting a mortgage taken for real estate sold by him to be made to his wife, who, on payment of the amount due, loaned it to him upon his note to a trustee for her use, such settlement cannot be impeached by creditors in the State of Pennsylvania whose claims arose several years thereafter, and more than one year after the husband had removed and engaged in business in the state, the transaction being valid under the *lex loci contractus*. (*Townsend v. Maynard*, 3 *Am. Law Reg.* [N. S.] 572. *S. C.* 45 *Penn. R.* 198.)

The wife may be a creditor of the husband under the laws of the commonwealth; but it is necessary in such a case that she prove her right as such creditor with great clearness. On this point it is held that there should be no doubt. Where there is a balancing question as to whether the money alleged to have been lent by the wife to her husband came from her means or his, it is held not to be error in the court to take the question from the jury. (*Hause v. Gilger, Administrator*, 6 *Am. Law Reg.* [N. S.] 635. *S. C.* 52 *Penn. R.* 412.)

The bond of a married woman is declared absolutely void, and so is any judgment on it, whether by warrant of attorney or otherwise. A married woman, owning real estate in Pennsylvania, sold part of it, and, with the proceeds of the land and of a note given by her, bought property in Maryland, and removed there; for this note there was substituted a bond and mortgage upon her remaining land, the proceeds of which on a sale did not discharge the mortgage, but left a deficiency for which the holder of the bond issued a foreign attachment. The court held that as the debt

was not within any of the provisions of the married woman's act of 1848, or covered by any of the decisions of the courts under that act, the action could not be maintained. (*Steinman v. Ewing*, 2 *Am. Law Reg.* [N. S.] 635. *S. C.* 43 *Penn. R.* 63.)

§ 542. Since the married woman's act of April 11, 1848, in Pennsylvania, the property of a married woman is absolutely vested in herself, and hence it has been held, that, in a prosecution for larceny of the wife's property, such property must be laid in the indictment to be in the wife, or the prosecution cannot be sustained. By this act, the husband has no control over his wife's property, such property cannot be taken in execution for the payment of his debts, and, therefore, in no sense can the property be regarded as his. (*Commonwealth v. Martin*, 1 *Am. Law Reg.* 434.)

It may be added that, by a statute of the commonwealth, the wives of mariners and others employed upon the high seas may trade and do business, and enjoy generally the rights of *femes-sole*. (*Dunlop's Laws*, ed. of 1853, pp. 75, 76.) And further that the husband is permitted to administer upon his deceased wife's estate, and the wife may generally administer upon the estate of her deceased husband. (*Dunlop's Laws*, pp. 461, 462.) And still further, if money is awarded to a married woman upon distribution or partition, or sale of her real estate, the statute requires that it be secured for her benefit. (*Dunlop's Laws*, pp. 483, 484.) It has been held, under the statutes of the commonwealth respecting marital rights, that a judgment admitted to be unobjectionable in point of honesty, given by a husband to his wife to recover her separate estate, is not void either in law or equity because of the legal unity of the parties. (*Williams' appeal*, 47 *Penn. R.* 307.) But the judgment bond of a married woman is absolutely void, though given for debts contracted before marriage, or for necessities for the support and maintenance of her family; her separate estate, if liable for debts thus contracted, must be reached through the proper form of action, and not by means of instruments declared to be null and void. Accordingly, when a married woman gave a judgment bond to one who advanced her money to be applied at the time for the purchase of real estate by her for her sole and separate use, and which was in fact so applied, the court held that the bond so given was void, and could not be enforced against her separate estate. (*Keiper v. Helfricker*, 2 *Am. Law Reg.* [N. S.] 504, 505. *S. C.* 42 *Penn. R.* 325.) But though a judgment given

by a *wife* for a debt contracted for the improvement of her real estate, is held to be absolutely void, she may agree to *revive* a judgment which was entered on a bond executed by her before marriage. (*Bruner's appeal*, 4 *Am. Law Reg.* [N. S.] 254. *S. C.* 47 *Penn. R.* 67.)

It was not the intent of the legislature, in passing the married woman's act of 1848, to change the marital relation, or to place the wife upon the footing of a *feme-sole*. It was intended to preserve to her, and to protect her *bona fide* separate estate, but not to make the law a means of fraud, or the wife a receptacle of her husband's means, into which they could be clandestinely thrown to the prejudice of his creditors. It is now well settled by the authorities that evidence that the wife purchased real or personal estate amounts to nothing unless it be accompanied by clear and full proof that she paid for it with her own separate funds—not that she had the means of paying, but that she in fact thus paid. This is regarded by the court as a definite, precise and just rule. (*Gault v. Saffin*, 44 *Penn. R.* 307. *Vide also Rhoads v. Gowen*, 38 *ib.* 277. *Aurand v. Schaffer*, 43 *ib.* 363.) But if it distinctly appears that the purchase of property by the wife was paid for as far as payments were made with the money of the wife, who at the time had ample means distinctly shown, from other sources, while her husband was a man of no property, and the judgment levied upon the property was obtained after her rights had fully vested; under such special circumstances the courts will sustain the title of the wife to the property, and permit her to hold it independent of her husband or his creditors. (*Conrad v. Shomo*, 44 *Pennsylvania R.* 193.)

It seems, however, that a married woman who has no separate estate cannot, as against her husband's creditors, acquire a title to property sold as his at sheriff's sale, by repurchase from the purchaser, and giving a mortgage on the property for the whole purchase-money. The court, in deciding the case, said: "We adhere to the settled doctrine that it is only when the property acquired after marriage has been paid for with her own separate estate, clearly and satisfactorily established, it is hers, and is protected from her husband's creditors. To suffer a wife to purchase on credit, is to open a wide door for fraud. Its effect is to throw upon the creditors the burden of proving whose funds afterward enter into the payments. For, starting with title founded on her

credit, she must stand upon it until the husband's means can be shown to enter into the purchase." *Barringer v. Stiver*, 4 *Am. Law Reg. [N. S.]* 559. *S. C.* 49 *Penn. R.* 129.)

The declaration of the husband that certain property belonged to his wife is not admissible as evidence in favor of the wife; and the mere possession of money by a wife is no evidence of her title to it for the purposes of the statutes of the commonwealth; such possession ordinarily implies that she is holding it for her husband. It is held further that the mere gift of money by the husband to the wife is not a settlement of it as her separate estate. (*Parvin v. Capewell*, 3 *Am. Law Reg. [N. S.]* 575. *S. C.* 45 *Penn. R.* 89.)

The rent of real estate bought by a married woman, who had with her husband given a mortgage for the purchase-money, cannot be attached by one of the creditors of the husband for a debt contracted by him after the purchase. (*Goff v. Nuttall*, 3 *Am. Law Reg. [N. S.]* 309. *S. C.* 44 *Penn. R.* 78.)

In Pennsylvania, dower and curtesy attach to both legal and equitable estates; although the widow's interest does not come within the ordinary definition of dower, but it is a statutory provision in lieu of that made by the common law; it has all the incidents of dower at common law and is a freehold estate. (*Dubs v. Dubs*, 32 *Penn. R.* 149. *Kurtz's appeal*, 26 *ib.* 465. *Bachman v. Chrisman*, 23 *ib.* 163. *Smith's appeal*, *ib.* 9. *Zeigler's appeal*, *Ib.* 173. *Thomas v. Simpson*, 3 *Ib.* 60. *Power v. Power*, 7 *Watts' R.* 212. *Pringle v. Gaw*, 5 *Serg. & Rawle's R.* 536.)*

§ 543. In the State of Delaware, the common law governs as a general thing in respect to husband and wife, although some changes have been made by statute. For example, the will made by a husband before his marriage does not affect his widow. She takes the same share of his estate as though the husband died intestate. (*Rev. Stat. ch.* 84, § 23.) Again, if the husband abandon his wife, the court may provide for the support of the wife and her children, if she have any, out of the property of the delinquent husband. (*Rev. Stat. ch.* 48, § 15.) And the statute expressly declares that the wife has no power to make a power of attorney. (*Rev. Stat. ch.* 83, § 13.)

* Mr. Cord, in his work on the rights of married women, has given the statutes of Pennsylvania with respect to marital rights tolerably full, together with a statement of many points settled by the authorities under those statutes, which has rendered essential aid in making this compilation. (*Cord's Husband and Wife*, 653-673.)

The courts hold in Delaware that the husband takes the wife's property by force of the marital right, and not as a *purchaser*, and he therefore takes the rights of the wife subject to all equities. (*Coleman v. Waples*, 1 *Harring. R.* 196.)

The Delaware courts also hold that a married woman's covenant to convey land will not bind her, and cannot be pleaded as an estoppel. (*Hersey v. Hersey*, 4 *Harring. R.* 517.)

It is likewise held that a court of law will not recognize a married woman's right to transact business and acquire property independent of her husband. (*Johnson v. Johnson*, 4 *Harring. R.* 171.)

A married woman in Delaware cannot make a valid deed of her own land so as to bind herself without her husband. (*Harris v. Burton*, 4 *Harring. R.* 66.)

§ 544. In the State of Maryland it is provided by statute that the property, real and personal, belonging to a woman at the time of her marriage, and all property which she may acquire or receive after her marriage, by purchase, gift, grant, devise, bequest, or in a course of distribution, shall be protected from the debts of the husband, and not in any way liable for the payment thereof, except that no acquisition of property passing to the wife from the husband after coverture shall be valid if the same has been made or granted to her in prejudice of the rights of his subsisting creditors; and the property thus acquired or owned by a married woman, she will hold for her separate use, with the power of devising the same as fully as if she were a *feme-sole*, or she may convey the same by a joint deed with the husband; provided, that if she die intestate, and leaving children, her husband shall have a life estate in her property, real and personal, but if she die intestate, leaving no children, her husband shall have a life estate in her real property, and her personal property shall vest in him absolutely. It is not necessary for a married woman to have a trustee to secure to her the sole and separate use of her property; but if she desires it, she may make a trustee by deed, her husband joining in the deed, or she may apply to a court of equity and have a trustee appointed, in which appointment the uses and trusts for which the trustee holds the property must be declared. (1 *Gen. Laws*, art. 45, §§ 1, 2, 3.)

Curtesy and dower are allowed in lands held by equitable title, but not to the prejudice of any claim for the purchase-money of

the lands, or other lien on the same. (1 *General Laws*, art. 45, §§ 5, 6.)

§ 545. The statutes of this state also provide that any married woman who by her skill, industry, or personal labor shall earn any money, or other property, real, personal or mixed, to the value of one thousand dollars or less, over and above her debts, may hold the same and the fruits, increase and profits thereof to her sole and separate use, with power as a *feme-sole* to invest and re-invest and sell and dispose of the same; provided that the same shall be liable for the payment of any claim or debt incurred by such married woman, and be liable to be proceeded against by attachment or in equity at the election of the creditor. (1 *Gen. Laws*, art. 45, § 7.)

Any married woman may convey her real and personal property, if her husband joins in the conveyance, whether the conveyance be absolute or by way of mortgage, and she may execute and acknowledge any deed, mortgage or bill of sale, in the same manner as other grantors or bargainors without any private examination or other ceremony, and she may relinquish her dower in any real estate by the joint deed of herself and husband, or by her separate deed. (1 *Gen. Laws*, art. 45.)

Provision is also made for a married woman to effect an insurance upon the life of her husband for her sole and separate use. (1 *Gen. Laws*, art. 45, § 8.)

§ 546. Whenever lands are leased to a married woman, she becomes liable to pay the rent reserved, and distress may be made for such rent, the same as though she was a *feme-sole*, or an action may be brought against her to recover the said rent in the same manner as against a *feme-sole*, and a married woman may bind herself in her conveyance of real estate, by any covenant running with the land, the same as a *feme-sole*. (*Laws of 1867*, ch. 223.)

The Maryland court of appeals have held, that when a married woman entitled to a distributive share of the proceeds of sale of real estate sold under a decree of a court of equity, for partition, after final ratification of sale, a compliance with the terms of sale by the purchaser and the filing of the creditor's report and account, died intestate and without issue, her surviving husband was entitled to the wife's distributive share of the proceeds of the sale. Such a sale was held to render the conversion of the land into personalty complete. (*Jones v. Plummer*, 20 *Md. R.* 416.)

All covenants, contracts and agreements of a *feme-covert*, except in regard to her separate property, are absolutely null and void, at law as well as in equity, and she is under no obligation, and cannot be compelled to perform them, whether made by herself, or on her behalf, by her husband, with or without his consent. (*Norris v. Lantz*, 18 *Md. R.* 260.) This rule is a little modified, as will be observed, by the laws of 1867, in this section contained.

A promissory note signed by a *feme-covert* cannot be enforced against her by any proceeding at law; a judgment by default against her, when sued at law on such note, is a *nullity*, and enforcement of it against her separate estate may be restrained in equity by injunction. The principle that a party cannot impeach a judgment on any ground which might have been pleaded or relied on as a defense to the suit, does not apply to a case when the defendant is a *feme-covert*, and not *sui juris*. (*Griffith v. Clarke*, 18 *Md. R.* 457. *Bridges v. McKenna*, 14 *Fb.* 258.)

§ 547. The court of appeals of Maryland have held that, at law, the right of the husband to release a legacy bequeathed to his wife, so as to bar her interest in it, is indisputable. This power of a husband over money to which the wife might become entitled by bequest, does not appear to have been restricted in Maryland, by any legislative act, until it was suspended by 1 Code, article 45, section 2, which provides that the property bequeathed to the wife shall be held for her separate use. The provisions of the act of 1853, chapter 245, operated to protect the property of a wife thus acquired, from the creditors of the husband, but did not affect the husband's marital rights or power over it. (*Weems v. Weems*, 19 *Md. R.* 334.)

The courts of Maryland hold that a married woman, having a separate estate, cannot affect that separate estate unless the obligation sought to be enforced presents, upon its face, some evidence of the intent to charge the estate, or there be evidence, *aliunde*, tending to prove such intent. (*Koontz v. Noble*, 16 *Md. R.* 549.)

Where personal property is given to a *feme-covert* to her separate use simply, without restricting her power of disposing of it, or prescribing the mode in which that power is to be exercised, she may act, in reference to the disposition of it, as a *feme-sole*. (*Chew v. Beall*, 13 *Md. R.* 348.)

The statutes of Maryland, relating to the rights of married women, simply protect the property of the wife from the debts of

the husband during her life, but in no other way interfere with his marital rights and control over it. (*Schindel v. Schindel*, 12 *Md. R.* 294.)

A married woman becoming seised of land by conveyance under the act of 1842, chapter 293, section 1, is vested with the estate in fee simple; not, however, to her sole and separate use, but subject to the marital rights of the husband, as a tenant by the curtesy. (*Mutual Insurance Co. v. Deale*, 18 *Md. R.* 26.)

CHAPTER XXXVI.

THE STATUTORY PECULIARITIES OF THE WESTERN STATES—LAWS OF OHIO, MICHIGAN, INDIANA, ILLINOIS, WISCONSIN, MINNESOTA, IOWA, MISSOURI, KANSAS, NEVADA, NEBRASKA, OREGON AND CALIFORNIA, IN RESPECT TO MARRIED WOMEN AND MARITAL RIGHTS—JUDICIAL CONSTRUCTION AND DECISIONS.

§ 548. In the State of Ohio, any married woman whose husband shall desert her, or from intemperance or other cause become incapacitated, or neglect to provide for his family, may, in her own name, make contracts for her own labor, and the labor of her minor children, and in her own name sue for and collect her own or their earnings. So also the interest of any married man in the real estate of his wife belonging to her at the time of their intermarriage, or which may have come to her by devise, gift, or inheritance during coverture, or which may have been purchased with her sole and separate money or other property, and, during her coverture, shall have been deeded to her, or to any trustee, in trust for her, cannot be taken, by any process of law or chancery, for the payment of his debts during the life of the wife, or the life or lives of the heir or heirs of her body. No interest of the husband in any chose in action, demand, legacy or bequest of his wife is liable to be taken by any process for the payment of his debts, unless reduced to possession by him, so as, by the rules of law, to have become the owner thereof in his marital right; and all articles of furniture and household goods which a wife shall have brought with her at marriage, or which shall have come to

her by bequest or gift, or which shall have been, after marriage, purchased with her separate money or other property, are declared to be exempt from liability for the debts of her husband during the life of the wife, and during the life of any heir of her body. (1 *Rev. Stat. ch.* 55, §§ 3, 4, 6, 7.)

§ 549. Under the statutes of Ohio, it has been held that a deed made without consideration, and purporting to be a conveyance of real estate from a husband directly to his wife, is void, both at law and in equity. (*Fowler v. Trebein*, 16 *Ohio St. R.* 493.) All conveyances and incumbrances of a husband's interest in his wife's land described in the statute, unless made or created as therein required, are held to be absolutely void as to the wife, if the husband's interest accrued after the taking effect of the statute. They are not void merely, as against a claim by the wife for her support, but as to her, they are void to all intents and purposes, and it is a question of doubt whether they have any validity as to the husband. (*Jenney v. Grey*, 5 *Ohio St. R.* 45.)

The act of April 17, 1857, securing to married women such personal property as may be exempt from execution, prohibits the husband from the sale, without the wife's consent, of any property which would be exempt if an execution had been levied thereon, and he, in good faith, had asserted the exemptions secured to him by the statute. The act confers upon the wife, when property thus exempted has been sold without her consent, an election to maintain an action against the purchaser for the specific property sold, or a suit to recover its value. (*Slawson v. Beardsley*, 9 *Ohio St. R.* 589. *Vide also Colwell v. Carper*, 15 *ib.* 279.)

A deed made by a married woman, not in conformity with the statute, her husband not joining with her in the conveyance, is held to be a *nullity*: and as a contract for a conveyance is alike *void*, and the failure of the husband to join in the conveyance, is not an "omission" within the meaning of the proviso of the twenty-eighth section of the second article of the constitution, so as to be *cured* by a judgment rendered in accordance with the provisions of the act of April 17, 1857. (*Miller v. Hine*, 13 *Ohio St. R.* 565. *Gashorn v. Purcell*, 11 *ib.* 641-646.)

A widow who in the life-time of her husband united with him in a mortgage of lands, of which he was seised in fee, has in equity a right to redeem; and a foreclosure, during the life-time of the husband, in chancery, to which the wife is not a party, does

not bar her equity of redemption. (*McArthur v. Franklin*, 15 *Ohio St. R.* 485.)

A married woman in Ohio may dispose of her property by will; and the will of a *feme-sole* is not revoked by her subsequent marriage. The husband must be joined with the wife in all actions in which she is a party, except those concerning her separate property, when she may sue by her next friend, as she may when the action is between herself and her husband; except when she sues her husband for divorce or alimony, she sues alone.

§ 550. In the State of Michigan the statutes have given power to a married woman to enjoy, contract, sell, transfer, mortgage, convey, devise or bequeath her property, in the same manner, and with the like effect as if she were unmarried. (2 *Comp. Laws*, § 3292.) When property stands in trust for her, the trustees are authorized to transfer the same to her. (2 *Comp. Laws*, § 3293.)

Under these statutes the supreme court of the state has held that the husband can convey real estate to his wife by deed directly, without the intervention of a trustee. The court holds that the statute evidently designs to do away with indirect dealings between husband and wife, and make the rights of the wife legal instead of equitable, observing, "to require a husband (who is not supposed to be under her control or fear) to go through the farce of conveying to some one else, who is at once to pass the property over to his wife, is to keep up a fiction which has not even a legal basis to support it, since the husband has ceased to have possessory claims over her property. He is now in law a stranger to her estate during coverture, instead of its possessor and manager. * * Whatever protection she may require when dealing with him, he certainly never was supposed to need any against her. Believing, as we do, that the basis of the common law disability was in the peculiar disqualifications and burdens of the wife, and that the removal of these removes all the reasons which ever required the intervention of equitable trusts, we think there is now no objection to a deed from husband to wife, which should render it invalid." (*Amperse v. Burdeno*, 5 *Am. Law Reg. [N. S.]* 275, 280.) The wife may transfer and convey her own property without the consent of her husband. (*Farr v. Sherman*, 11 *Mich. R.* 33. *Watson v. Thurber*, 1*b.* 457.)

The rule which allows the husband to convey his own property directly to his wife does not seem to apply with all its force in case

of a transfer from the wife to her husband. The supreme court has held that a husband who, under the pretense of a contract, obtains his wife's property for a consideration entirely nominal, which neither benefits her nor really incommodes him, is bound to make clear and satisfactory proof of fair dealing, or a court of equity will set aside the transfer. (*Stiles v. Stiles*, 5 *Am. Law Reg.* [N. S.] 252, 253. *S. C.* 14 *Mich. R.* 72.)

§ 551. The statute empowering a married woman to contract, sell, and dispose of her property the same as if she were unmarried, does not authorize her to engage generally in a business of a commercial nature, to be carried on mostly on the credit of the business and with the money derived therefrom, so as to make the proceeds her own. Where a married woman, being owner of a grist-mill, nominally entered into the business of buying, flouring and selling wheat on a large scale, and the business was done by her husband acting ostensibly as her agent, and was done principally upon the credit of the business; and the husband being indebted, one of his creditors levied upon some of the personal property in the business as his, the court held that the wife could not maintain an action against the officer for the property levied upon. (*Glover v. Alcott*, 2 *Am. Law Reg.* [N. S.] 696. *S. C.* 11 *Mich. R.* 471.)

When a married woman keeps a boarding-house with the consent of her husband and controls the entire business, contracts of purchase made by her for the purpose of such business must be considered as contracts in relation to her sole property, and therefore binding upon her. (*Tillman v. Shakelton*, 15 *Mich. R.* 447.)

Under the act of 1855 (*Comp. Laws*, p. 966) a wife can make a mortgage to secure her husband's debts, and the same may be executed in the same manner as though she was a *feme-sole*, and will bind her lands which are covered by the mortgage. (*Watson v. Thurber*, 11 *Mich. R.* 457.)

§ 552. In the State of Indiana it is provided that the personal property of the wife held by her at the time of her marriage, or acquired during coverture by descent, devise or gift, shall remain her own property to the same extent and under the same rules as her real estate so remains, and on the death of the husband before the wife, such personal property shall go to the wife, and on the death of the wife before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances. (1 *Rev. Stat.* 1862, p. 295, note 2.)

Under this statute it has been held that the personal property of the wife held by her at the time of her marriage, remains her separate property. (*Williams v. Miller*, 9 *Ind. R.* 100.)

When a *feme-sole*, being the payee of a promissory note, married prior to this act, it was held that the husband acquired a property in the note, and he alone can pass it by indorsement, and he could sue upon it without joining his wife. The husband's right to the note in such case vested at the time of the enactment of the statute, and was not affected by the enactment. (*Holland v. Moody*, 12 *Ind. R.* 170.)

A promissory note given to a *feme-covert* for money belonging to her before her marriage, and remaining her separate property afterward cannot, under the statutes of Indiana, be pleaded as a set-off in a suit against her husband. (*McCarty v. Mewhinney*, 8 *Ind. R.* 513.)

By the statutes of Indiana, a married woman cannot convey her separate property, either real or personal, without the consent of her husband. (*Ruse v. Cochran*, 10 *Ind. R.* 195.)

§ 553. With respect to the real estate of the wife in the State of Indiana, it is provided that no lands of any married woman shall be liable for the debts of the husband, but such lands and the profits therefrom are declared to be her separate property, as fully as if she was unmarried, although she has no power granted her to incumber or convey such lands except by deed, in which her husband shall join. (1 *Rev. Stat. ch.* 77, § 4.)

Under this statute a *feme-covert* is authorized to join with her husband in the execution of a conveyance of real estate, but she cannot be bound by any of the covenants contained in the conveyance. (*Aldridge v. Burlison*, 3 *Blackf. R.* 201.)

If a widow having an estate in dower marry, her husband, and those claiming under him, have a right to the enjoyment of the premises during the existence of the marriage. However, if the wife after such marriage, be divorced *a vinculo matrimonii*, the estate is thereby restored to her. (*Doe v. Brown*, 5 *Blackf. R.* 309.)

A *feme-covert*, under the statute of the state, cannot alien her real estate unless her husband join in the conveyance. (*Scott v. Purcell*, 7 *Blackf. R.* 66.)

If the husband sell the lands of his wife for his own benefit, with an agreement with her that he will purchase other land of

equal value for her, and, in pursuance of such agreement, buys lands and takes the conveyance to his wife, it is held that the lands thus conveyed will not be subject in equity to the debts of the husband contracted after he paid for the lands, but before the conveyance. (*Barnett v. Gering*, 8 *Blackf. R.* 284.)

Debts contracted by the wife on the faith of her separate property are not, in a legal sense, an incumbrance upon such separate estate, and are, therefore, not embraced in the restriction of the statute, which provides that the wife shall have no power to incumber or convey lands constituting her separate estate, "except by deed in which her husband shall join." (*Kautrowitz v. Prather*, 6 *Am. Law Reg. [N. S.]* 602.)

The statute does not in any way impair the husband's rights in the real estate of his wife held before the statute was enacted, provided the marriage was also entered into prior to the statute. (*Junction Railroad Co. v. Harris*, 9 *Ind. R.* 184.)

The separate deed of the husband will convey no interest in the wife's land. (1 *Rev. Stat. ch.* 76. § 6.)

All suits relative to the lands of the wife must be prosecuted by or against the husband and wife jointly, except they are separated, and then in the name of the wife alone; and, in case of a separate suit, the husband will not be liable for costs. (1 *Rev. Stat. ch.* 76, § 7.)

§ 554. When the wife receives money during coverture, which is left under the control and management of the husband, and which they both treat as her separate property, the jury may find from these circumstances that the wife is the sole owner. (*Ewing v. Gray*, 12 *Ind. R.* 64.)

Although the presumption is that money of the wife reduced to possession by the husband during the marriage becomes his, such presumption is not conclusive, and the husband may so treat it as to charge himself and his heirs as the trustees of the wife, with the duty of applying it to her separate use. (*Resor v. Resor*, 9 *Ind. R.* 347. *Totten v. McManus*, 5 *ib.* 407.)

In an action in relation to her separate property, a wife may, under the statutes of Indiana, sue her husband without *prochein ami*, except she be under twenty-one years of age. (*Wilkins v. Miller*, 9 *Ind. R.* 100.)

§ 555. It is provided by the statutes of Indiana that when a married man shall absent himself from the state, abandon his wife,

and not making sufficient provision for her maintenance, if the wife is of the age of twenty-one years, the circuit court, or court of common pleas of the county in which she resides, may, on her petition, authorize her to sell and convey her real estate, or any part thereof, and also any personal estate which shall at any time have come to her husband by reason of the marriage, and which may remain within the state undisposed of by him. The court may also authorize any person holding money or personal property to which the husband is entitled in right of the wife, to deliver it to the wife, and authorize her to give a discharge for the same. And it is further provided that during such absence of the husband the wife shall be entitled to receive payment for her labor and that of her minor children, in the same manner as if she were sole, free from the control of her husband, and from all liability for the payment of his debts of any description. And all the proceeds of all sales; and all other money and personal property coming to the hands of the wife under the authority mentioned, may be used and disposed of by her during the absence of her husband as her own property, in the same manner as if she were unmarried.

The court may also authorize such married woman to make any contract under seal or otherwise, in her own name, and also to commence, prosecute and defend any suit at law to a final judgment and execution in like manner as if she were unmarried; and when so authorized may execute all papers, and do all other acts that may be necessary or proper to carry into effect the power so granted to her. All the powers thus granted to a married woman will continue and may be exercised by her until her husband shall return into the state and claim his marital rights. The wife will be liable to be sued on all contracts executed by her under the powers thus granted her, and no suit against her in regard to any such contract will abate by reason of the return of her husband, but the husband may be admitted to defend the action; and any judgment against the wife in such case may be enforced against the husband. (*Act of March 4, 1857, Laws of 1857, p. 92. 1 Rev. Stat. pp. 375, 376, § 1-11.*)

In case the husband absents himself from his home, his wife may exercise the rights that the husband could in all cases of attachment or execution against his property. (*Laws of 1857, p. 94. 1 Rev. Stat. p. 377.*)

§ 556. Married women in Indiana of full age and of sound mind, are authorized by statute to execute a will, and by it devise any interest descendible to their heirs, which they have in any lands, tenements, and hereditaments, or in any personal property, to any person or corporation. In this respect they are placed upon the same footing with their husbands. (2 *Rev. Stat. part 4, ch. 3, § 1.*)

If a husband die testate or intestate leaving a widow, one-third of his real estate will descend to her in fee simple free from all demands of creditors; provided, that if the real estate exceeds in value ten thousand dollars, the widow will take but one-fourth; and if it exceeds in value twenty thousand dollars, as against creditors, she will take but one-fifth, and, with this proviso, a surviving wife is entitled to one-third of all the real estate of which her husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined in due form of law; and also of all the lands in which her husband had an equitable interest at the time of his death; provided, that if the husband shall have left a will, the wife may elect to take under the will instead of the provisions of the statute above stated. (1 *Rev. Stat. ch. 46, §§ 17, 19, 20.*)

Tenancy by the curtesy and in dower is abolished by the statutes of the state, and it is unnecessary, therefore, to refer to the numerous decisions of the courts upon this subject, which were reported before the estate was abolished. (1 *Rev. Stat. 46, § 16.*)

The husband does not, under the statutes of Indiana, acquire any legal interest or estate in the lands of the wife, but the same and the profits thereof remain her separate property. (*Davis v. Clark, 26 Ind. R. 424.*)

§ 557. In the State of Illinois, an act was passed by the general assembly on the twenty-first day of February, 1861, entitled "An act to protect married women in their separate property," which provides that all the property, both real and personal, belonging to any married woman, as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person, other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as

though she was sole and unmarried ; and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband. (*Laws of 1861, p. 143.*)

Under this statute, the supreme court of the state have decided that a *feme-covert* must be considered a *feme-sole* in regard to her estate of every sort owned by her before marriage, or which she may acquire during coverture in good faith from any person not her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof ; and that the same is to be under her "sole control," and to be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried. By the statute the *feme-covert* is unmarried so far as her property is concerned, and can deal with it as she pleases. Having the "sole control" of it, she may bring actions in her own name, without joining her husband to recover it, or for trespasses on it. The object of the statute was to keep the wife's property out of the control of her husband in any and every respect ; that the wife should be wholly independent of him in regard to it.

The court say : "In the progress of civilization, an artificial state of society has grown up incompatible, to some extent, with that state of simplicity from which many rules of the common law have been derived, and affecting in a serious degree the artificial relations of society, and among them, that of husband and wife. In these days of excitement and speculation, by which fortunes are wrecked in a moment, and the innocent made to suffer for no misconduct of their own, it has been thought wise and expedient, by the legislature of this and of other states, to protect the property of married women, not only from such catastrophies, but to remove it entirely from the control of her husband, and making her, as it regards such property, to all intents and purposes a single women." The court therefore decided that a married woman, under the act, may bring an action at law in her own name, in all matters concerning her separate property, without joining her husband ; adding : "We are well satisfied the act can have no very beneficial operation in favor of married women, to be effective in the protection of her separate property, unless the 'sole control' conferred upon her over it, is made to extend to the commencement and prosecution of suits for its recovery, even against her husband, should he, contrary to her wishes, and in contempt of her rights,

unlawfully interfere with it. * * * We see no other mode by which this statute can be made effectual for the purposes contemplated by the legislature, than by holding the wife, as to her separate property, capable of suing for its recovery in all courts." (*Emerson v. Clayton*, 3 *Am. Law Reg.* [N. S.] 530-533. *S. C.* 32 *Ill. R.* 493.)

The courts of Illinois hold that the domicile of the husband is the domicile of the wife. (*Davis v. Davis*, 30 *Ill. R.* 180.)

§ 558. When a *feme-covert*, owning real estate in her own right, voluntarily mortgaged it to secure a debt due by her husband, the courts of Illinois held it not to be contrary to equity and good conscience that the debt should be paid out of this fund so set apart for that purpose. (*Young v. Graff*, 28 *Ill. R.* 20, 28.) But it is held that a married woman, who has a separate estate, cannot part with it, or charge it in any way, without an examination, as by marriage she loses all the powers of a *feme-sole*. A separate estate does not confer all those powers on her, and, therefore, the power of appointing such estate must be expressly given, and the mode prescribed be strictly pursued. The weight of authority is held clearly to be, that a married woman can convey her trust property only in the manner authorized, and for the purposes specified in the instrument creating the trust, if it contains any such provisions. (*Swift v. Castle*, 23 *Ill. R.* 209, 217, 222.) Acting upon the principle that the participation of the wife in the transfer of her real estate must be free and unconstrained, the courts have held that an agreement made by a *feme-covert*, with the assent of her husband, to sell her real estate, is absolutely void at the common law, and that such contract cannot be enforced in equity in Illinois; and the courts further hold that a court of equity has no power to rectify and reform mistakes in deeds made by married women for a conveyance of their real estate, upon the ground that their deeds, to be effectual, must be acknowledged freely and voluntarily, and in the mode prescribed by statute. (*Moulton v. Hurd*, 20 *Ill. R.* 137, 142, 143.)

It is held that a conveyance from the husband to a third party creates in the wife an equitable estate, and, having an equitable estate, she is entitled to redeem from a mortgage. So, a *feme-covert* may redeem her equitable estate in property conveyed by her husband and herself to secure the payment of money loaned to the husband, where the husband and wife continued to occupy

the premises as a homestead. (*Whitecomb v. Sutherland*, 18 Ill. R. 578, 579.)

§ 559. In the State of Wisconsin, the real estate, and the rents, issues and profits thereof, belonging to any married woman, are declared by statute to be her sole and separate property as if she were a single female, and are not subject to the disposal of her husband; and the real and personal property of any female, which she owns at the time of her marriage, and the rents, issues and profits thereof, continue to be her sole and separate property, and are not subject to the disposal of her husband, nor liable for his debts. The statute further provides that any married female may receive by inheritance, or by gift, grant, devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner, and with like effect as if she were unmarried, and the same are not subject to the disposal of her husband, nor liable for his debts. (*Rev. Stat.* 1858, *ch.* 95, §§ 1, 2, 3.)

Under these provisions of the statute, it has been held that married women can make all such contracts as are necessary or convenient to the beneficial enjoyment of their separate property, and that such contracts are valid in law (*Conway v. Smith*, 13 Wis. R. 125); but that all her other engagements stand as before the passage of the statute, good only in equity. The change from an equitable to a legal estate has not, with respect to her general engagements, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity without restriction as to the *jus disponendi*, capable of charging it with debts incurred for her own benefit, or the benefit of her estate, to its full extent; and such charge may be enforced in a civil action under the Wisconsin Code of Procedure, although the action should be *in rem*, not *in personam*, because the wife is incapable of charging herself *personally* either in law or equity. The courts further hold that injunctions and receivers in such actions may be had to preserve the property during the pendency of the suits, and to convert the property and satisfy the debts, for want of other process, after judgment. And, further, that the husband is a proper party, but no personal demand can be made against him in such cases. At common law, the personalty of the wife vests absolutely in the husband, and, although he may be liable

for her debts upon the principles of agency, yet, even under the Wisconsin Code of Procedure, to bind him or his property, a separate action at law must be brought. This common law rule has no application in such cases in equity; and whether the husband is liable or not, is a question for the jury. Therefore, where a *feme-covert*, the owner of a separate estate under the enabling statute, with her husband's permission, upon the faith and credit of her separate estate, purchased goods and hired a store, and engaged in trade as if she were *sole*, failed to pay for the rent, and refused to pay for the goods, because of coverture, in an action brought to charge the rent and price of the goods upon her separate estate, and to apply the goods left to liquidate the claims in suit, the court held that, as it is an established rule in equity that a *feme-covert* may, with her husband's permission, given even after marriage, become a *sole trader*, and hold the profits arising out of her business to her sole and separate use, so, in equity, in consideration of the benefit thus accruing to her separate property, the court will charge the debts properly incurred in trade upon it, and apply both her separate property and stock in trade to their payment, through a receiver. (*Todd v. Lee*, 1 *Am. Law Reg. [N. S.]* 657. *S. C.* 15 *Wis. R.* 365.)

§ 560. In delivering the opinion of the court in *Todd v. Lee* (*supra*), Dixon, Ch. J., reviewed the authorities of New York and other states, with marked ability, and, among other things, remarked: "Before the case of *Yale v. Dederer* (22 *N. Y. R.* 450), it was well settled in New York, if in fact any thing can ever be said to be settled in that state, that a married woman, having a separate estate, might bind it by her general engagements to pay debts contracted for the benefit of such estate, or on her own account, or for her benefit upon the credit of it. * * * In England a broader doctrine prevails. It has been decided that she may not only bind her separate property by a general engagement, written or parol, for her own benefit, or that of her estate (*Murray v. Barlee*, 3 *M. & K. R.* 209; *Owens v. Dickenson*, 1 *Cr. & Ph. R.* 48), but that she can do so by the execution of a bond as surety for her husband (2 *Atk. R.* 69; 1 *Bro. C. C. R.* 16); and for a stranger even. (15 *Vesey's R.* 596.) In Kentucky her separate estate has been charged with the payment of a note executed as surety for her son, and parol evidence of her declaration, made at the time of executing it, that she would not pay it, and her separate property

should not go for that purpose, was excluded. (7 *B. Mon. R.* 293.) The courts of New York, however, have held to a narrower rule, and she has been restricted within the limits above stated. * * * The contracts of a married woman, when necessary or convenient to the proper use and enjoyment of her separate estate, are binding at law. (*Conway v. Smith*, 13 *Wis. R.* 125.) All her other engagements stood, as before the passage of the statutes, good in equity. The change from an equitable to a legal estate has not, with respect to them, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity, without restriction as to the power of disposition. (*Id.* *Wooster v. Northrups*, 5 *Wis. R.* 245. *Yale v. Dederer*, 18 *N. Y. R.* 265.) * * * Within all the authorities, the separate estate of a married woman will be charged in equity with the payment of debts contracted for her benefit."

§ 561. Under the statutes of Wisconsin, the courts have held, that, in trespass by a firm, one member of which is a married woman, against an officer, for taking, on an execution against the husband of the female plaintiff, goods which are alleged to belong to the firm, it is necessary for the plaintiffs to show that the interest of the female plaintiff in the goods was her *separate estate*. (*Duress v. Horneffer*, 3 *Am. Law Reg. [N. S.]* 509. *S. C.* 15 *Wis. R.* 195.) In a suit to foreclose a mortgage against a subsequent purchaser of the mortgaged premises, the answer of the defendant that at the time of the execution of the note and the mortgage, the mortgagor was a married woman, was held bad on demurrer, under the laws of the state. (*Dodge v. Silverthorn*, 12 *Wisconsin R.* 644.)

When services are performed by an attorney for a married woman at her request, in reducing to her possession her separate estate, the courts hold that the action of the attorney against such married woman to recover his claim is properly at law and not in equity. Dixon, Ch. J., in delivering the opinion of the court, said: "It would seem to be not only very convenient but especially necessary to the proper use and enjoyment of her separate estate, that a married woman having such estate should have power to contract with an attorney for his services in order to reduce the same or any part of it to her possession, whenever it is wrongfully withheld by another. It would also seem to be one of the essential attributes of the unqualified dominion given by statute to a married

woman over her separate estate, not only that she should be capable of entering into a contract of this nature with reference to such estate, but that such contract should be binding at law: we think it is." (*Leonard v. Ragan*, 20 Wis. R. 540, 542.) The same doctrine has been enunciated in other cases, and it may therefore be regarded as well settled under the statute of Wisconsin, however it may be regarded in other states. (*Vide Conway v. Smith*, 13 Wis. R. 125. *Todd v. Lee*, 15 *ib.* 365.) When a *feme-covert*, with the assent of her husband, engages in business as a *sole trader*, and contracts a debt for goods to carry it on, upon the faith of her separate estate, the property which she holds to her sole and separate use is chargeable with its payment. The decision in *Todd v. Lee* (*supra*) was referred to and adhered to. In enforcing payment of such debts out of the separate estate of the *feme-covert*, when there is no writing constituting the debt a specific lien, it is held that courts do not proceed upon the ground that the transaction creates a specific lien for the debt upon any particular property; but upon the ground that all her separate estate becomes chargeable with a debt so contracted, through the intervention of a court of equity; and if several debts have been thus contracted at different times, the several creditors are to be paid *pari passu*. Payment of a debt thus contracted by a *feme-covert* on the faith of her separate estate will be enforced as well against the separate estate which she may thereafter acquire as that which she had when the debt was created. (*Todd v. Lee*, 16 Wis. R. 480.)

When a husband, a hotel-keeper, made an agreement with his wife, without any valuable consideration, that she should keep the hotel during his absence from the state, and have all the avails of the business as her separate estate, the court held that her earnings in such business were in *law* his property, and that she could not maintain an action on a note purchased by her with such earnings. (*Stimson v. White*, 20 Wis. R. 562. *Vide also Elliott v. Bentley*, 17 *ib.* 591.)

§ 562. The statute provides that any married woman whose husband, either from drunkenness, profligacy, or from any other cause, shall neglect or refuse to provide for her support, or for the support and education of her children, and any married woman who may be deserted by her husband, shall have the right in her own name to transact business, and to receive and collect her own earnings and the earnings of her own minor children, and apply the same

for her own support and the support and education of such children, free from the control or interference of her husband, or any person claiming the same, or claiming to be released from the same by or through her husband. (*Rev. Stat. ch. 95, § 4.*)

It has been held by the supreme court of the state that the words "any other cause," used in this statute, must be understood of causes *ejusdem generis*, or to conduct tending to the same result as drunkenness or profligacy, and do not include mere physical or mental incapacity, unless it was caused by vice. But laziness, idleness or indolence will be sufficient to enable the wife under the provisions of this statute to act as a *feme-sole*. (*Edson v. Hayden*, 20 *Wis. R.* 682.)

The supreme court has held that a married woman whose husband has deserted her, and ceased to support his family, and has left the state without any intention to return, cannot maintain an action to set aside an assignment, made by her husband, of a school-land certificate, and to have the certificate delivered up to her by the assignee, on the ground that the assignment was procured fraudulently, nor on the ground that the land embraced in the certificate was, at the time of the assignment, occupied by the husband and family as a homestead, and that she refused to become a party to the assignment. But if the assignment in such case is void, the court held that the wife can maintain possession of the homestead against the holder of the certificate. (*Green v. Lyndes*, 12 *Wis. R.* 404.)

§ 563. The courts hold, in Wisconsin, that a husband may act as the agent of his wife in transactions relating to her separate estate, and may execute in her name a conveyance of her land under a power of attorney. (*Weisbrod v. Chicago and Northwestern Railway Company*, 18 *Wis. R.* 35.) The courts have also held that, though void at law, an absolute conveyance of real or personal property from a husband directly to his wife is sufficient in equity to vest the property in the wife as against all persons except the creditors of the husband, especially when the transfer is fairly made upon a meritorious or valuable consideration. (*Putnam v. Bicknel*, 18 *Wis. R.* 333.)

A wife has no power, by virtue of the marital relation merely, to bind her husband by any contract made by her; but he is bound by such contracts only when it is shown, or the law presumes, that she acted as his agent. (*Savage v. Davis*, 18 *Wis. R.* 608.)

Under the statutes of Wisconsin, tenancies by the curtesy, in cases where the wife dies intestate, still exist. The statute has not abolished tenancies by the curtesy in such cases. (*Kingsley v. Smith*, 14 Wis. R. 360.)

§ 564. In the State of Minnesota, a general and beneficial power may be given to a married woman to dispose, during the marriage, and without the concurrence of her husband, of land conveyed or devised to her in fee. And a married woman may execute a power during her marriage by grant or devise, as may be authorized by the power, without the concurrence of her husband, unless by the terms of the power its execution by her during marriage is expressly or impliedly prohibited; but no power vested in a married woman during infancy can be exercised by her until she attains her full age. (*Gen. Stat.* 1858, *ch.* 34, §§ 8, 38.)

The statutes of the state further declare that any real or personal estate which may have been acquired by any female before her marriage, either by her own personal industry or by inheritance, gift, grant or devise, or to which she may at any time after her marriage be entitled by inheritance, gift, grant or devise, and the rents, profits and income of such real estate, shall be and continue the real and personal estate of such female after marriage to the same extent as before marriage; and none of such property is liable for her husband's debts, engagements or liabilities; though the wife cannot give, grant, or sell any such real or personal property during coverture, without the consent of her husband, except by order of the district court of the county. (*Gen. Stat.* 1858, *ch.* 61, § 106.) And if any married woman dies without disposing of such real estate, the husband surviving her is entitled to a life estate therein by the curtesy. (*Gen. Stat.* 1858, *ch.* 61, § 108.)

§ 565. Where a husband transferred to his wife certain promissory notes owned by him, in consideration of five hundred dollars in money received from her own separate and individual property, and soon afterward applied for a discharge from his debts under the insolvent act, the court held that such transfer was not conclusive evidence of a fraudulent intent on the part of the husband, even though he was insolvent at the time; and, the referee having found that the transfer was made in good faith, and not with the intent to cover up the property of the husband, or to defraud his creditors, the judgment of the referee in favor of the defendants was not disturbed on error. (*Teller v. Bishop*, 8 Minn. R. 226.)

The supreme court of the state further held, that a gift from a husband to his wife of a promissory note directly and without the intervention of a trustee, although a nullity at law, will be recognized and enforced in equity, as against the maker of the note and the husband, when the rights of creditors are not prejudiced thereby. (*Tullis v. Fridley*, 9 *Minn. R.* 79.)

And still further, the court held in another case, that a conveyance of real estate by the husband directly to his wife will be upheld as a suitable provision for her maintenance, when it appears to be a fair transaction, not made in fraud of creditors and not unreasonable in its amount, taking into consideration all the circumstances of the case. (*Wilder v. Brooks*, 10 *Minn. R.* 50.)

When a married woman sues for her separate property under the statutes of Minnesota, her husband is not a necessary party, plaintiff or defendant. (*Nininger v. Commissioners of Carver county*, 10 *Minn. R.* 133.)

When a married woman objects to signing a deed of real property, and is thereupon addressed by her husband in harsh, threatening and abusive language, though not in the presence of the acknowledging officer, and immediately thereafter in the presence of her husband she acknowledges the same to be her voluntary act, the court held that the presence of the husband is a coercive presence, and the acknowledgment is not taken "separately and apart" from her husband in the spirit and meaning of the statute, and the instrument is ineffectual to pass her interest in the land. (*Edgerton v. Jones*, 10 *Minn. R.* 427.)

And the court held in another case, that threats by a husband to separate from his wife, accompanied by general abusive treatment, will constitute duress so as to avoid a deed executed by her under a reasonable apprehension that they will be carried into effect. (*Tapley v. Tapley*, 10 *Minn. R.* 448.)

In the State of Minnesota they have a very liberal provision with respect to the homestead, and the same cannot be sold or incumbered by the husband except his wife join in the conveyance or incumbrance, and it is exempt from the husband's debts, although the exemption does not extend to any mortgage on the homestead lawfully obtained, but the same is declared not to be valid "without the signature of the wife to the same, unless such mortgage shall be given to secure the payment of the purchase-money or some portion thereof." (*Comp. Stat. p.* 570, § 93.) Under this

provision, the court holds that only the *signature* of the wife to a mortgage of the homestead by her husband is required. (*Lawver v. Slingerland*, 11 *Minn. R.* 447.)

§ 566. In the State of Iowa, the personal property of the wife does not vest at once in the husband; but, if left under his control, it will, in favor of third persons acting in good faith and without knowledge of the real ownership, be presumed to have been transferred to him, except that if the wife file with the recorder of deeds a statement of the amount in value of such property, and a notice that she has a claim therefor out of the estate of her husband, then she will be a preferred creditor of her husband to that extent. And specific articles of personal property may be owned by the wife exempt from the husband's debts, although left under his control, if notice is filed with the vendee of her ownership of such property. (*Rev. Laws* 1860, *ch.* 101, §§ 2499, 2500, 2501, 2502. *Vide also* *Smith v. Hewett*, 13 *Iowa R.* 94. *Odell v. Lee*, 14 *ib.* 411.)

Contracts made by a wife in relation to her separate property, or those purporting to bind herself only, do not bind the husband; and married women abandoned by their husbands may obtain authority from the district court of the county in which they reside to act and to transact business as though unmarried, and then all deeds made, and receipts given, and discharges executed and delivered, by the wife, in accordance with the power given by the court, are declared valid. The husband has the same rights in relation to the wife and her property as is given to the wife, and he may have the same proceedings in like cases. The husband cannot remove the wife nor their children from their homestead without the consent of the wife; and if he abandons her, she is entitled to the custody of their minor children, unless the district court, upon application for that purpose, shall, for good cause, otherwise direct. (*Rev. Laws*, *ch.* 101, §§ 2506, 2508-2514.)

Married women may receive grants or gifts of property from their husbands without the intervention of trustees; but this provision applies only to form and manner, and leaves the substantial rights of all parties unchanged. (*Rev. Laws*, *ch.* 92, § 2200.)

A married woman may convey her interest in real estate in Iowa in the same manner as other persons. (*Rev. Laws*, *ch.* 95, § 2216.)

When a married woman is a party to an action, her husband must be joined with her, except that when the action concerns her

separate property, or is founded on her own contract, she may sue and be sued alone; and when the action is between herself and husband, she may sue and be sued alone, and in no case need she prosecute or defend by a guardian or next friend. (*Rev. Laws, ch. 117, § 2771. And vide Kramer v. Conger, 16 Iowa R. 434.*)

§ 567. When a *feme-covert*, by her contract, as a promissory note or the like, becomes liable, she may sue and be sued at law, in the same manner as any other person. Generally, the liability of a *feme-covert* upon her contract, is not a personal liability, but it only tends to and can only affect her separate property or estate; and *prima facie* a *feme-covert* is still, in Iowa, unable to contract, or to sue and to be sued. With reference to certain matters, however, by the statute, a *feme-covert* may contract, and sue and be sued. But in order to make her liable in her separate property, upon a contract entered into during coverture, it must be shown that such contract related to the expenses of the family, or to other purposes as contemplated by the Code, or that it related to her separate property, or that the contract purports to bind herself only, according to the provision of the statute. (*Rodemeyer v. Rodman, 5 Iowa R. 426.*)

When a wife is deserted by the husband, and she continues to live apart from him, and is dependent upon herself for a support, she may sue and be sued alone, and, in the same case, the court held, that to call a woman a "whore," is actionable of itself, without proof of special damage. (*Smith v. Silmer, 4 Iowa R. 321.*)

It was the main purpose of the Code of 1851 and the Revision of 1860, to protect the rights of married women in their property, but not to invest them with power to make contracts of all kinds, sign notes, become sureties for their husbands and others, and engage in general business by executory contracts which can be enforced in actions at law. An executory contract by a married woman to purchase property is not "a contract in relation to her separate property" within the meaning of section 2506 of the Revision of 1860. (*Jones v. Crosthwaite, 17 Iowa R. 393.*)

The earnings of a wife in Iowa, during coverture, are held to belong to the husband, and are subject to the payment of his debts. (*Laing v. Cunningham, 17 Iowa R. 510. Duncan v. Roselle, 15 ib. 501.*)

A *feme-covert* in the State of Iowa having the power to convey her real estate in the same manner as other persons, the courts there

hold that she may convey it to her husband, and in return or in consideration thereof, receive from him a grant or conveyance of other property, and that she may also, for a money consideration, make or execute to him a release of her interest in his real estate. (*Blake v. Blake*, 7 Iowa R. 46. But vide *McMullin v. McMullin*, 10 *ib.* 412.)

It has been held that a wife will be entitled in equity to obtain a separate provision out of property held by her husband in her right, only in case that he has deserted her without giving her adequate means of support, or has forced her by cruel treatment to leave him. (*McMullin v. McMullin*, *supra*.)

§ 568. In the State of Missouri, when any married man shall abandon his wife, or from worthlessness, drunkenness, or other cause, fail to make sufficient provision for her support, the circuit court of the county where she has her home and residence may authorize her to sell and convey her real estate or any part thereof, or any personal estate, which came to the husband by reason of the marriage, and which may remain within the state undisposed of by him. The court may also authorize any person holding money or other personal estate to which the husband is entitled in her right, to pay and deliver the same to the wife, and authorize her to give a discharge for the same. And, during the period her husband shall fail to provide for her as above stated, the wife is entitled to the proceeds of her own earnings, and also to the proceeds of the earnings of her minor children; and the same are declared to be under her sole control, and exempt from her husband's debts; and all the proceeds of such sales, and all other money and personal estate which shall come to the hands of the wife by force of the above provisions, may be used and disposed of by her, during the absence of her husband, for the necessary support of herself and family.

The statute further provides that when any married man shall be sentenced to and shall be confined in the state penitentiary, his wife, during his confinement shall be deemed a *feme-sole*, so far as to enable her to carry on and transact business on her own account during such confinement of her husband, and she may sue and be sued as a *feme-sole* in all cases where the cause of action arose while her husband was so imprisoned, and she is entitled to the same privileges during the husband's imprisonment as are secured to the wife when her husband abandons her as above provided.

Any married woman is authorized by the statute, to devise by her last will and testament, her lands, tenements, or any descendible interest therein, provided that the same shall not affect the estate of her husband therein by the curtesy.

The statute also provides that the rents, issues and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, shall, during coverture, be exempt from attachment or levy of execution for the sole debts of her husband; and the husband can make no valid conveyance thereof, unless his wife join in the conveyance; and any property, consisting of stocks and bonds of any kind, given by a parent to a daughter, with the proceeds thereof, are declared to belong to such daughter, if married, in her own right, and cannot be made subject to the payment of the debts of her husband, and the same may be disposed of by her the same as if she were unmarried. (*Gen. Stat.* 1865, *ch.* 115.)

§ 569. The courts have held that, under the statutes of the state, the property of the wife owned by her at, or acquired by her after, marriage, and the interest of her husband therein, are exempt from levy and sale under execution against the husband, for debts contracted by him before marriage, or the acquisition of such property by the wife. (*White v. Dorris*, 35 *Mo. R.* 181.)

When husband and wife live together, the possession of the separate property of the wife by the husband will be deemed in law the possession of the wife, who has the title. (*Stewart v. Ball's Administrator*, 33 *Mo. R.* 154.)

It is held in Missouri, that the recitals in a deed, by which a married woman purports to convey her title to land, do not estop her, nor those claiming under her, from asserting the truth against the recitals. (*Hempstead v. Easton*, 33 *Mo. R.* 142.)

The husband cannot, in Missouri, by his deed, alien the estate of his wife in lands without her consent. (*Boyle v. Chambers*, 32 *Mo. R.* 46.)

When property had been conveyed to trustees to the sole use of a married woman, "and to such uses and purposes, and in such manner, as she might, in writing, appoint," and subsequently she became an indorser of a negotiable promissory note; the court held, that such indorsement was an appointment in writing, whereby she charged her separate estate. The court further held, in the same case, that when the action concerns the separate property of the

wife, she must sue or defend by her next friend, without joining the husband. But when it is sought to charge the wife's separate estate with her debts, her trustee is a proper party defendant, so that in case of sale the legal title may be conveyed. (*Claflin v. Van Wagener*, 32 *Mo. R.* 252.) And it has been held that, in a suit to charge the separate estate of a married woman, she cannot appear and defend by attorney; and that, if she do thus appear, the judgment will be reversed for error. (*Fox v. Tooke*, 34 *Mo. R.* 509.)

In Missouri, when a deed was offered in evidence, purporting to convey the titles of married women to land, and their names were in the handwriting of other persons, and there was no proof that the women had either signed or acknowledged the deed, the supreme court of the United States held, that it was properly refused by the court below to be allowed to go to the jury. It was further held, in the same case, that a succession accruing to the wife during marriage is her paraphernal property, which she may administer without the consent or control of her husband, and that the real estate in question was paraphernal, and could not be conveyed away by the husbands of the wives on whom it descended from their father. (*Meegan v. Boyle*, 19 *How. U. S. R.* 130.)

§ 570. In the State of Kansas, the statute provides that the property, real and personal, which any woman owns at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by devise, bequest or descent, or the gifts of any person, except her husband, shall remain her sole and separate property, notwithstanding her marriage, and shall not be subject to the disposal of her husband, or liable for his debts. Any *feme-covert* may sell and convey her personal and real property, and enter into any contract with reference to the same, as if she were sole, and she may sue and be sued as to all matters respecting her separate property, the same as if she were sole, and she may make a valid will. She may also carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman, from her trade, business, labor or services, are declared to be her sole and separate property, and they may be used or invested by her in her own name. (*Rev. Stat. of 1862, ch. 91.*)

It has been held by the supreme court of Kansas, that a married woman in bringing a suit upon a promissory note in her own name,

can only maintain her action on the ground that the note is her sole property. Therefore, it seems to be a defense to a note held by a married woman, to show that it actually belongs to her husband. (*Hadley v. Brown*, 2 *Kansas R.* 416.)

§ 571. In the new State of Nevada the statute provides that a husband and wife may by their joint deed convey the real estate of the wife, in like manner as she could do by her separate deed if unmarried; but that no covenant, express or implied, in any such conveyance, shall bind such married woman or her heirs, except so far as may be necessary effectually to convey all the right and interest belonging to her and expressed to be conveyed. (*Laws of 1861, ch. 9, § 2.*)

The statute of the state further provides that all property, both real and personal, of the wife, owned by her before marriage, and that acquired afterward by gift, bequest, devise or descent, shall be her separate property, and that property similarly owned before or acquired after marriage by the husband shall be his separate property, and that all property acquired after marriage by either party, except as above stated, shall be common property.

In order to protect the property of the wife from liability for the debts of her husband, the statute requires that she make, sign and acknowledge, and record in the office of the recorder of the county in which the parties reside, an inventory of her separate property. The statute further declares that the husband shall have the management and control of the separate property of the wife during coverture; but no alienation, sale or conveyance of the real property of the wife or any contract for the alienation thereof, or of any lien or incumbrance created thereon, will be valid except by an instrument in writing, executed and acknowledged by the husband and wife. The wife may have a trustee for her separate property appointed by the district court, if justly apprehensive that the same will be mismanaged or wasted by the husband. The husband has the entire management and control of the common property, but it can only be disposed of by transfer, in the same manner that the wife's separate property can be disposed of. Dower and curtesy are abolished, but on the death of the wife the whole common property goes to the husband, and on the death of the husband half of the common property goes to the wife, and the other half to the descendants of the husband, or parties entitled to his separate property. (*Laws of 1864, 1865, ch. 76.*)

By a recent statute, a married woman may be a trader in her own name, on application to the court, upon a notice publicly advertised four weeks, of her intention to apply for the order; and upon the granting the application by the court, she becomes a sole trader, and is made responsible for the maintenance of her own children, and the husband is not liable for any debts contracted by her in the business. (*Laws of 1867, ch. 10.*)

When any married woman is a party to an action, her husband is required to be joined with her, except when the action concerns her separate property, she may sue alone, and when the action is between husband and wife, she may sue or be sued alone. (*Laws of 1861, ch. 103, § 7.*)

§ 572. In the new State of Nebraska, the statute provides that any real estate belonging to a married woman, may be managed, controlled, leased, devised or conveyed by her by deed, or by will, in the same manner, and with the like effect as if she were single; but she can convey her right of dower in her husband's real estate only by a joint conveyance with her husband, and she is not bound by any covenant in a joint deed by herself and husband. (*Rev. Stat. 1866, ch. 43, §§ 47, 48, 53.*)

The statutes of Nebraska further provide that when a married woman is a party to an action, her husband must be joined with her, except that when the action concerns her separate property she may sue without her husband by her next friend. (*Rev. Stat. tit. 3, § 33.*)

§ 573. In the State of Oregon, by the constitution, the property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise or inheritance, are not subject to the debts or contracts of the husband. (*State Const. art. 15, § 5.*) And by statute all such property and rights are declared to be the separate property of such married woman, and not subject to be taken in execution, or in any way charged on account of the debts or contracts of her husband, from and after the time said property or pecuniary rights are recorded. A declaration to hold separate property executed and acknowledged by a *feme-covert* must be recorded with the county clerk, in order to secure the benefits of the statutory provision. (*General Laws, 1864, ch. 32.*)

A married woman in Oregon may, by will, dispose of any real estate held in her own right, subject to any rights which her

husband may have as tenant by the curtesy. (*Gen. Laws*, 1864, ch. 62, § 13.) And in all suits where the action concerns her separate property, a *feme-covert* may sue alone. (*Gen. Laws*, 1864, ch. 1, § 30.) Without acknowledgment, a married woman does not relinquish her dower by signing and sealing her husband's deed. (*Moore v. Thomas*, 1 *Oregon R.* 201.) The courts have held, that, under the constitution of the state, in cases of deeds without covenants, the same rule applies to a *feme-covert* as to a *feme-sole*, as the constitution gives married women the control and disposition of their real estate. Hence, the doctrine of estoppel is held to apply to married women, and they are bound by recitals contained in their deeds. (*Graham v. Meek*, 1 *Oregon R.* 325. *But vide Fahie v. Pressey*, *Decisions Sup. Court*, 1866, p. 16.)

It has also been held, by the supreme court, that the provisions of the constitution and statutes must be so construed as to allow a married woman not only to hold property as separate property, without the intervention of a trustee, but also to exchange one species of her separate property for another, and to authorize her to sell any part of her separate property and retain the purchase-money as her own, or, with it, buy other property, to be held by her in the same manner and for the same purpose. (*Brummet v. Weaver*, *Dec. Sup. Court*, 1866, p. 42.) And in the same case, it was held that either registration or actual or constructive notice, as in cases of deeds and mortgages of lands, would be sufficient to bind the party attempting to deal with her husband concerning her property. (*Id.* 46.) And it has also been held, that a married woman cannot be deprived of her real estate, except by her deed. (*Carter v. Chapman*, *Dec. Sup. Court*, 1866, p. 5.)

§ 574. In California, all property, both real and personal, owned before marriage by husband and wife, or acquired during coverture by either party, by gift, bequest, devise, or descent, is declared to be the separate property of each; all otherwise acquired property during coverture is the common property of both. The law, however, requires an inventory of the wife's separate property to be made, acknowledged and recorded, as is required in the new State of Nevada; and this inventory is regarded as notice of the wife's title, and the property included in it is exempt from seizure or execution for the husband's debts. The husband has the management and control of the wife's property, but has no power to

alienate it or create any lien upon it, except his wife join him in the conveyance. The personal property of the wife cannot be sold, assigned, or transferred, unless both husband and wife join in the sale, assignment, or transfer thereof, except property which she is or may be authorized by law to sell, assign, or transfer as a *feme-sole*. The husband has the entire control and management of the common property, and an absolute power to dispose of his own separate property. The rents and profits of the separate property of both parties are considered common property, unless the terms of the gift to the wife require a different arrangement. Dower and curtesy are abolished by statute, and, in lieu of these tenures, upon the death of either party the survivor takes an interest in the common property.

When a married woman is a party to an action, her husband^a must be joined, except, if the action concerns her separate property, she may sue alone; and, if the action is between herself and her husband, she may sue and be sued alone. If both husband and wife are sued together, the wife may defend in her own right. The wife may carry on in her own name any business, trade, profession, or art, under her own name, and the money, property, etc., invested belongs exclusively to her, and in respect to this she has all the legal privileges and disabilities of debtor and creditor; and, in these circumstances, the wife is responsible for the maintenance of her children. But, in order that a wife may avail herself of this provision of law, she is required to reside in the state, and must make a declaration before a notary public or other person authorized to take acknowledgment of deeds, that she intends to carry on business in her own name and on her own account, specifically setting forth in her declaration the nature of the business, trade, profession, or art in which she proposes to engage; and the amount invested in the business must not exceed five thousand dollars, unless the declaration contain also a statement under oath that the surplus of money above five thousand dollars invested in said business did not come from any funds belonging to her husband. (*Wood's Dig. ch. 44, arts. 2605-2614, 2624-2629. Laws of 1862, p. 518, § 1. Wood's Dig. ch. 23, §§ 7, 8.*)

§ 575. A married woman of legal age is given the power to convey and transfer lands or any estate or interest therein, vested in or held by her in her own right, as fully and perfectly as she might or could do if single or unmarried; *provided* the husband be not,

and for one year next preceding the execution of the instrument of conveyance by the wife has not been, *bona fide* residing in the state. (*Wood's Dig. ch. 44, § 2630.*)

A *feme-covert* may dispose of all her separate estate by will, absolutely, without the consent of her husband, either express or implied, and may alter or revoke the same in like manner as a person under no disability may do; but her will is required to be attested, witnessed, and proven in like manner as all other wills. (*Laws of 1866, ch. 285, § 1.*)

Upon the dissolution of the community by the death of the wife, the entire common property, without administration, goes to the surviving husband; upon the dissolution of the community by the death of the husband, one-half of the common property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, such other half goes to the descendants of the husband, equally, if such descendants are in the same degree of kindred to the intestate, otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, such remaining half is subject to distribution in the same manner as the separate property of the husband; *provided*, that in case of the dissolution of the community by the death of the husband, the entire common property is made equally subject to his debts, the family allowance, and the charges and expenses of administration. (*Laws of 1864, ch. 333, § 1.*)

The laws of Nevada in respect to husband and wife, so far as they go, are so very similar to the laws of California upon the same subject, that it is probable the former were copied from the latter.

It will be observed that the statute of California has done away with the common law right of dower, and substituted in place of it the half interest in the common property, of which the husband and wife are jointly seised during coverture, subject only to the husband's disposal during their joint lives; and this provision is the same whether the wife resides in the state or not. (*Beard v. Know, 5 Cal. R. 256. Scott v. Ward, 13 ib. 469.*)

Upon the death of the husband, the wife is entitled to half the common property, subject to the payment of the debts of the community. The husband has not the power, by a last will and testament, to dispose of the wife's interest and estate in the common property. (*Morrison v. Bowman, 29 Cal. R. 337.*)

§ 576. It has been held that the statute does not affect the property after acquired in the state, if acquired by a husband or wife whose marriage occurred elsewhere, unless they "resided and acquired the property herein." (*Dye v. Dye*, 11 *Cal. R.* 167.)

The reasonable presumption which attends the possession of property by either spouse during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant after marriage, or acquired afterward in one of the particular ways specified in the statutes, and that it is property taken in exchange for or in the investment, or as the price of the property so originally owned or acquired. (*Meyer v. Kinzer*, 12 *Cal. R.* 253. *Tryon v. Sutton*, 13 *ib.* 493.)

Under the statutes of California, the joining of the husband in the conveyance of a wife of her separate estate, is not for the purpose of passing title, for he has none to convey. It is only a precaution against imposition, or similar reasons of policy, or to evidence his renunciation of the right to manage or control it. (*Ingolsby v. Juan*, 12 *Cal. R.* 576.)

A deed by a husband of his separate real estate to a trustee for the benefit of his wife, whether executed in compliance with an antenuptial contract, or by way of settlement upon his wife, independent of any previous contract, the husband being at the time free from debts and liabilities, is held to be valid. The law allows, and even regards with favor, provisions made by the husband, when in solvent circumstances, for his wife and family against the possible misfortunes of a future day, by setting apart a portion of his property for their benefit. (*Barker v. Kineman*, 13 *Cal. R.* 10.)

Where husband and wife execute a note and mortgage, the note is held to be good as to the husband, even if void as to the wife, and the property is bound by the mortgage, independent of the note of the wife. (*Pfeiffer v. Reihn*, 13 *Cal. R.* 649.)

The mortgage of the husband and wife of the wife's land to secure the debt of the husband, is held to be valid. (*De Leon v. Hequera*, 15 *Cal. R.* 489.)

§ 577. The Code of California gives to a married woman the right to sue without the husband, in an action concerning her separate estate. Property owned by the wife before marriage, and that acquired afterward by gift, bequest, devise or descent, are declared to be her separate property, and the rents and profits of the separate

property are declared to be common property. The statute confers on the parties before marriage an unlimited right to make whatever stipulation they may agree upon in respect to property, and this is not confined to property in *esse*, but contemplates property to be acquired, and the rents and profits of the present estate. It does not dispense with the interposition of trustees to protect the wife, except with respect to the property specified in the act. In all other respects the common law remains unaltered, and the wife may resort to trustees for all purposes of security. If the husband should take the rents and profits, he will be held to account for the wife's benefit, and to the same extent as if he had undertaken a specific trust. The law which deprives a married woman of the right to make contracts is not altered by the statute, unless in respect to the property specified by it, and she cannot bring suit in her own name upon a contract which she is not authorized by statute to make. (*Snyder v. Webb*, 3 *Cal. R.* 86, 87, 88. *And vide Rowe v. Kohle*, 4 *ib.* 285. *Luning v. Brady*, 10 *ib.* 267.)

But the Code permits the wife to sue alone when the action is between herself and her husband, and takes away the necessity of suing by *prochien ami*. It is a remedial statute, and must be beneficially construed. (*Kashaw v. Kashaw*, 3 *Cal. R.* 321.)

The interest of the wife in the common property is held to be a present, definite and certain interest, which becomes absolute at the death of her husband. Taking a legacy by a wife, under the will of the husband, will not prevent her from contesting the validity of the will, so far as it disposes of the half interest in the common property to others. She is entitled to her own share and to the legacy out of the share of her husband. (*Beard v. Know*, 5 *Cal. R.* 256, 257.)

A promissory note executed by a *feme-covert* is held to be absolutely void, unless it is a well defined exception of the law. (*Simpers v. Sloan*, 5 *Cal. R.* 458. *Poole v. Gerrard*, 6 *ib.* 72.)

The capacity of the wife to hold separate property is created by the constitution of the state, and her title thereto depends upon the mode of acquisition, and vests before the inventory provided for can be filed. Under the statute of the state, the sale of the separate property of the wife, whether real or personal, must be in writing, signed and acknowledged in the manner pointed out by the statute, or it is void. A married woman can, to some extent, avoid the inconvenience of the privy examination, in the sale of

articles of personal property, by executing a power of attorney. From the position that the capacity of the wife as to her separate property is equal to that of the husband as to his separate property, grave doubts have been expressed as to the validity of some of the provisions of the California statutes. (*Selover v. American Russian Com. Co.*, 7 Cal. R. 270, 271, 172, 273.)

A sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband. (*Alverson v. Jones*, 10 Cal. R. 12.)

The court will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claims of the wife. (*Smith v. Smith*, 12 Cal. R. 226.)

The courts of California hold that the doctrine of estoppel *in pais* has no application to the estates of married women; and further, that a conveyance of a *feme-covert*, not executed according to the forms prescribed by statute, is invalid. (*Morrison v. Wilson*, 13 Cal. R. 497.)

It is held that the title of the common property is in the husband, and he can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor. (*Van Maren v. Johnson*, 15 Cal. R. 310. *But vide Smith v. Smith, supra.*)

Neither the husband nor his creditors can claim the proceeds or fruits of the separate estates of the wife. A law giving them such fruits is unconstitutional. (*George v. Ransom*, 15 Cal. R. 323.)

§ 578. In an action against a *feme-sole* trader, it is improper to join her husband with her as defendant, and a complaint so drawn is demurrable. The effect of the statute is to make a *feme-sole* of a married woman who is a sole trader, as to the particular business in which she is engaged. And in an action brought by a married woman concerning property belonging to her as a sole trader, the husband need not be joined. (*McKune v. McGarvey*, 6 Cal. R. 498. *Guttman v. Scannell*, 7 *ib.* 458.)

By the provisions of the sole trader's act, the legislature designed to afford to every married woman an opportunity of providing against the improvidence or misfortunes of her husband, by engaging in all legitimate callings, by protecting her earnings against her husband and his creditors, and enabling her, by her own energy and industry, to support herself and children. So far from

forbidding, the law, by the plainest implication, intends that the capital invested by the wife as a sole trader, to the extent of \$5,000, may be furnished by the husband. If the husband at the time was insolvent, the transfer as to his creditors would be fraudulent and void. The act does not confine sole trading to any particular trade or occupation, nor prohibit the husband from being employed by, or acting for his wife in the business. The fact that the business was unsuited to the sex of the wife, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but not conclusive evidence of it. (*Guttman v. Scannell*, 7 Cal. R. 458. *Vide Alverson v. Jones*, 10 Cal. R. 12. And also *Aiken v. Davis*, 17 *ib.* 119. *Lawrence v. Spear*, *Ib.* 421.)

§ 579. The courts hold that property purchased during coverture with funds which constitute a part of the separate estate of the wife, will also be her separate estate. A mortgage executed by the grantee of the husband upon property purchased with funds belonging to the separate estate of the wife, and deeded to the wife during coverture, is a cloud upon the wife's title which a court of equity will remove.

The presumption is, that property conveyed to the wife for a money consideration is common property; but this presumption may be rebutted by showing that it was purchased with money belonging to her separate estate. Parties purchasing of the husband real estate deeded to the wife for a money consideration during coverture, do so at their peril. The record of the deed to the wife is regarded as notice to all the world that the land *may be* the separate property of the wife, and is sufficient to put purchasers upon inquiry. (*Ramsdell v. Fuller*, 28 Cal. R. 41. And *vide Hart v. Robertson*, 21 *ib.* 346. *Burton v. Sies*, *Ib.* 87.)

The rights of married women as to their separate property and their power over it, in California, do not depend alone on the principles of the common law, or upon the doctrines of courts of equity, but mainly upon the constitution and statutes of the state. Except in special cases, as under the sole trader's act, a married woman cannot, by contract, create a personal liability against herself in any form.

Under the laws of California a married woman, by the mere execution of a promissory note in the ordinary form, in consideration of services rendered or moneys furnished for her benefit or the benefit of her separate estate, or by the purchase of goods in

the ordinary mode for her separate use, with the intent and understanding that the demand thus arising shall be satisfied out of her separate estate, cannot create a charge or incumbrance upon such separate estate; nor can a court of equity impose and enforce such claim or demand as a charge or incumbrance upon such separate estate. (*Macloy v. Love*, 25 *Cal. R.* 374, 381.)

All property which can be shown by satisfactory testimony to belong to the separate estate of the wife, whether real, personal or mixed, and all the rents, issues, and increase thereof, are, under section fourteen of article eleven of the constitution, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband. No legal or beneficial interest in the use or enjoyment of the wife's separate property passes by the fact of marriage to the husband, and the wife's right of property in the same is as complete after marriage as while a *feme-sole*. The husband cannot, by any independent act of his, acquire an interest in such separate estate of the wife, nor by his supervision or labor can he acquire any interest in the increase of the same. In the absence of any express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his supervision of, and labor bestowed upon, her separate property. (*Hope v. Jones*, 24 *Cal. R.* 92.)

CHAPTER XXXVII.

STATUTORY POLICY OF THE SOUTHERN STATES IN RESPECT TO HUSBAND AND WIFE AND MARITAL RIGHTS—LAWS OF VIRGINIA, WEST VIRGINIA, KENTUCKY, TENNESSEE, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, ARKANSAS AND TEXAS—JUDICIAL CONSTRUCTION AND DECISIONS.

§ 580. THERE does not seem to be any thing distinctive in the statutes of Virginia, or West Virginia, in respect to husband and wife, or marital rights; in the main, the common law doctrine prevails. In West Virginia the court of appeals have held, upon common law principles, that a gift of choses in action from a husband to his wife, although void at law; will be sustained by a court of equity when it is not unreasonable in its provisions, nor in fraud

of creditors, and that the intervention of a trustee is not necessary to make a gift or settlement to a wife, whether the estate is derived from the husband or a stranger; and, further, that the husband, during his life-time, and his personal representatives after his death, will be treated as a trustee for the wife of such estate, and be enjoined from making any legal disposition of it in contravention to the trust. But there is nothing peculiar in this doctrine, as it is recognized in all the states and in England. (*Fox v. Jones*, 1 W. Va. R. 205.)

By the statute of Virginia a married woman may convey "any estate or interest" belonging to her by uniting in a deed with her husband, and being privily examined, and such deed is declared to have the same effect to pass her interest as if she were an unmarried woman. (1 *Rev. Code*, 1819, p. 368. *Code* 1849, ch. 121, § 7.) The court of appeals have held that this statute does not apply to personal estate, and that a deed executed by husband and wife, with the formalities of the act, and admitted to record, is not sufficient to pass the interest of the wife in personal estate which was incapable of being reduced into possession by the husband. (*Nelson v. Jennings*, 2 Va. R. 369.)

§ 581. The courts of Virginia hold that a court of equity will not decree a specific performance of a contract by a husband and wife for the sale of the wife's land, at the suit of the vendee, the wife refusing to execute the contract; nor will the court compel the husband to convey his life estate to the vendee, with compensation for the failure of the wife to convey her interest in the land. The court declared, in the same case, that, under the statute (*Code*, ch. 121, § 7, p. 514), the deed of a married woman with *general warranty* can operate no further on her representatives than to pass such right, title and interest as at the date of such deed she might have in the estate thereby conveyed. (*Clarke v. Reins*, 12 *Gratt. R.* 98.)

When a husband carries on a mercantile business as agent for his wife, and he is aided by his sons, who are minors, and the business is profitable, and property is accumulated from its profits, the courts of Virginia hold that the husband has an interest in the property, which may be subjected by his creditors to the payment of his debts. (*Penn v. Whiteheads*, 12 *Gratt. R.* 74.)

The courts of Virginia hold that under their statutes a husband is not a competent witness to a deed executed during the marriage

by which real estate is conveyed to his wife, either for the purpose of proving due execution of the deed when called in question, or for the purpose of having it admitted to record. (*Johnston v. Slater*, 11 *Gratt. R.* 321.)

It has been held by the court of appeals of Virginia that a deed from a husband to his wife, conveying to her all his property, real and personal, under circumstances showing a strong meritorious consideration, set up in equity against a nephew, the heir at law of the grantor, may be sustained. (*Jones v. Obenchain*, 10 *Gratt. R.* 259.)

A deed executed by husband and wife under a power of attorney, was held to be the deed of the husband, though void as to the wife, the power as to the wife being void. (*Shanks v. Lancaster*, 5 *Gratt. R.* 110.)

The court of appeals doubted, in a case before them, whether the wife joining with her husband in a conveyance of land as his land, thereby divests herself of her equitable interest in the land. (*Heth v. Richmond, Fredericksburgh and Potomac R. R. Co.*, 4 *Gratt. R.* 482.)

§ 582. In the State of Kentucky it is provided by statute that marriage shall give to the husband, during the life of the wife, no estate or interest in her real estate or chattels real, owned at the time or acquired by her after marriage, except the use thereof, with power to rent the real estate for not more than three years at a time, and receive the rent therefor; and further that such real estate and rent shall not be liable for any debt or responsibility of his, contracted or incurred before or after marriage, but are liable for her debts and responsibilities contracted or incurred before marriage, and for such contracted after marriage on account of necessities for herself or any member of her family, her husband included, as shall be evidenced by writing signed by her and her husband; and the remedy may be against both or against her alone, as the case may require. Though the husband's contingent right of curtesy or life estate, or right to the use and rent of the wife's real estate, cannot be sold for, or otherwise subjected to the payment of, any separate debt or responsibility of his during the life of his wife, the husband is not liable for any debt or responsibility of the wife contracted or incurred before marriage, except to the amount of whatever he may receive by her, independent of real estate, and the use and rent thereof; except for necessities fur-

nished her after marriage, he is liable as formerly. (2 *Rev.' Stat. art. 2, ch. 47, §§ 1, 3.*)

The well settled doctrine formerly was, that, by virtue of the marriage, the husband acquired an estate for life of the wife, or during coverture, in lands owned by her; this is the rule at common law, and therefore the husband might sell his interest in his wife's lands, or the same might be sold by virtue of a judgment and execution against him, and, on such sale, the purchaser was entitled to the husband's interest, and with it the right to the possession during coverture, and, in case a tenancy by the curtesy attached, during the life of the husband. (*McLain v. Gregg, 2 Marsh. R. 455. Smith v. Long, 1 J. P. Metc. R. 487.*) But it will be observed that this rule of the common law is now changed by the statute. It has been held, however, that although the statute essentially modifies the pre-existing marital rights of the husband as therein named, yet the only object of the restriction upon the power of the husband, as it respects the period for which he may rent the real estate of his wife, evidently was to secure more effectually to her the exercise of her right of appropriating the rents and profits in the purchase of necessities for herself and family, and also of her further right to demand of the chancellor an equitable settlement upon herself, out of the rents and issues of her real estate, whenever she may present a case which would authorize such equitable remedy on her behalf. The restriction is merely upon the property, as to the general pre-existing marital rights of the husband; and it is decided that the statute was not intended to convert the rents and profits of the wife's lands into a separate estate, for her exclusive use and benefit, and subject to her exclusive control and dominion, without regard to the circumstances of herself and husband, or their family; and that she cannot recover rents and profits of the vendors for her lands against the contract of her husband, on a rescission of such contract, in the absence of sufficient ground for an equitable settlement upon her, upon the pre-existing principles of equity. (*Smith v. Long, supra.*)

As the law now stands, the real estate owned by the wife, and the rents and profits thereof, are exempted from any liability for the debts of the husband; but they are liable for her debts contracted before coverture. (*Smith v. Wilson, 2 Metc. R. 237.*) The provision of the statute with respect to the liability of the wife's property for necessities furnished the family, relates simply to the

general property as contradistinguished from her *separate* estate. (*Toombs v. Stone*, 2 *Metc. R.* 522.) The *general* estate of a *feme-covert* is liable to the payment of debts contracted after marriage for necessities for herself and family, but only when evidenced by a writing signed by herself and her husband. (*Marshall v. Miller*, 3 *Metc. R.* 333.)

§ 583. It has been judicially declared that by the authorities the following propositions are substantially settled :

1. That, before the Kentucky act of 1846, the husband upon his marriage became entitled absolutely to all the personal estate belonging to his wife, in possession or reduced to possession during coverture, and the same was, to all intents and purposes, *his* property. This was simply the common law rule.

2. That the husband, either as distributee of the wife's estate, or as her administrator if he survived her, was entitled to all the *choses* in action and *vested* rights to her personal estate belonging to the wife before her marriage, or coming to her during her marriage, and when reduced to his possession as administrator he was not bound to distribute them, but might appropriate them to his own use. This, too, is the common law rule. But these rights are now subject to the provisions of the acts of 1846 and 1852.

3. That personal property conveyed before 1846, to a trustee for the separate use of the wife, on her death vests absolutely in the husband, unless otherwise directed by the terms of the deed, or will, creating the estate. (*Cox v. Coleman*, 13 *B. Mon. R.* 458. And *vide Brown v. Alden*, 14 *ib.* 148. *Payne v. Payne*, 11 *ib.* 138. *Ackett v. Everett*, 12 *ib.* 371. *Richardson v. Spencer*, 18 *ib.* 450.)

Where, by an antenuptial contract, it is agreed that the wife shall hold her property to her separate use, to dispose of as she pleases during the coverture, by deed or will, and the wife dies without making any disposition thereof, the agreement is at an end, and the husband has the same right therein as if the antenuptial contract had never existed, and, before the acts of 1846 and 1852, would have *vested* absolutely in the husband ; but those acts restrain and limit his estate therein to that of an estate for life. (*Hart v. Seward*, 14 *B. Mon. R.* 304.)

A release by a wife of her potential right of dower forms a valuable consideration sufficient to sustain a settlement upon her by her husband, even against the creditors of the husband. (*Ward v. Crotty*, 4 *Metc. R.* 59.)

Antenuptial agreements which are fair and reasonable will be enforced in equity. A conveyance from the husband to his wife will be upheld in equity; and even executory contracts between husband and wife, without a trustee, are good in equity. So held by the courts of Kentucky upon authority. (*Marraman v. Marraman*, 4 *Metc. R.* 84.)

It has been held that the word "necessaries," as used in the statute, should receive a liberal construction, to embrace such things as the family ought to have and enjoy, including the husband, considering the social position of the family and the estate of the wife. But the proof must show that the debt is for such necessities within the law, for which the wife's estate can be rendered liable, or the action will fail as to the wife. (*Berger v. Forsythe*, 17 *B. Monroe's R.* 556. *Pell v. Cole*, 2 *Metcalf's R.* 252.)

§ 584. Since the act of 1846, the wife's legal title is recognized as a separate estate, and such separate estate may be created by a parol gift, or other transfer, when the title to the property will pass without a transfer or conveyance in writing, but, to sustain such a gift, it must be clearly and distinctly proved that it was made for the sole and separate use of the wife to the exclusion of the husband. (*Tinsley v. Roll*, 2 *Metc. R.* 509. *Wheeler v. Jennings*, 16 *B. Mon. R.* 481. *McClanahan v. Beasley*, 17 *ib.* 113.) But the presumption of title in the husband, of the wife's property, which obtained from his possession before the act of 1846, does not since that act exist, and her property is not now liable for his debts. (*Craig v. Payne*, 4 *Bibb's R.* 337. *Blair v. Davis, Executor*, 9 *B. Mon. R.* 61. *McClanahan v. Beasley*, *supra*. *Wheeler v. Jennings*, *supra*.) The wife cannot, as the law now stands, make a valid executory contract for the sale or purchase of land, except in the manner authorized by statute, unless she has a separate estate in the land sold or agreed to be sold. Her power as to her *separate* property is imparted under the instrument creating it as such, and she has the exclusive control of such property, except as limited by the instrument under which she holds it. It seems that all of her real estate does not, even now, belong to her as her separate estate. (*Johnson v. Jones*, 12 *B. Mon. R.* 330. *Petty v. Malier*, 14 *ib.* 247.) No statute prior to those of 1846 and 1852 authorized the wife to convey any thing but land, and consequently no conveyance previous to those acts,

and none since not made in conformity thereto, could pass any interest of the wife. (*Lynn v. Bradley*, 1 *Metc. R.* 232.)

There has been a large amount of litigation under the married woman's acts with respect to property in slaves, but, as that species of property is no longer recognized in Kentucky, it is not necessary to state here the result of such litigation.

The husband is liable under the present law for the debts contracted by his wife *dum sola* to the extent of the personal estate received by her; but in order to recover such a debt, it is necessary that the action be prosecuted against the husband and wife. The passage of the act of 1846 and 1852 does not require any change in the mode of proceedings against husband and wife for the debts of the wife, other than that the judgment should show how it is to be levied. The obligation of the husband for the debts of the wife created before marriage, is not absolute, but contingent. The death of the husband or the wife destroys the liability. For, as the law stood prior to the act, the debt of a *feme-sole* was not, on her marriage, considered as transferred to her husband. If it had been, he or his executor would have been liable after the termination of the coverture. The debt remained hers, notwithstanding her marriage, and upon her husband's death, if the debt was unpaid, her liability existed, as it had done prior to her marriage. The contract was the contract of the wife, and not of the husband, and, therefore, the law exempting his estate from the payment of the debt of his wife contracted *dum sola*, cannot be regarded as having the effect of impairing the obligation of the contract. (*Fultz v. Fox*, 9 *B. Mon. R.* 502.)

In an action against a husband and his wife to recover upon the contract of the wife *dum sola*, it is not necessary to aver that the husband has received property by his wife. (*Fultz v. Fox*, *supra*.) The provisions of law with respect to actions against married women are contained in the Code, which declares that "when a married woman is a party, her husband must be joined with her, except that, when the action concerns her separate property, she may sue alone." (*Civil Code*, ch. 5, § 49. *And vide Beaumont v. Miller*, 1 *Metc. R.* 70.)

The provision of section forty-nine of the Civil Code, that when the action concerns the separate estate of the wife, or when the action is between husband and wife, she may sue alone, relates merely to the form of procedure. It confers no new right of

action. It, in fact, dispenses with the necessity of a next friend, and that is about all. (*Matson v. Matson*, 4 *Metc. R.* 262.)

§ 585. When the husband abandons the wife and lives separately and apart from her, or abandons her and leaves the state, without making sufficient provision for her maintenance, or when he is confined in the penitentiary for an unexpired term of more than one year, the wife may, by petition in chancery, be empowered to use, enjoy and sell, for her own benefit, any property she may acquire thereafter, or may have acquired since the abandonment or leaving the state; to make contracts, sue and be sued as a single woman; and also to recover in her own name, any property or debt to which she may be entitled, or to which the husband is entitled in her right. She may also be empowered to sell and convey by her own deed, any of her real estate freed from any claim of her husband. But such husband, upon manifesting proper disposition again to cohabit with his wife, and make suitable provision for her, or upon his release from the penitentiary, by his petition may, in the discretion of the court, have all or part of said powers revoked, and take upon himself the prosecution or defense of any suit pending by or against him. (2 *Rev. Stat. art. 2, ch. 47, §§ 4, 5.*)

When the real estate of a wife is taken for a railroad, turnpike, or other public use, or shall be damaged by such road, turnpike, or other public work, the compensation or damages must be appropriated by the court in such manner as she on privy examination may direct, or without such examination, for her benefit, in such manner as to the court may seem just. (2 *Rev. Stat. art. 2, ch. 47, § 7.*)

A married woman coming from another state or country, to Kentucky, without her husband, he never having resided in the state, may contract, buy and sell, sue and be sued, as an unmarried woman; but the arrival of her husband in the state, and claiming his marital rights, will revoke all such power, leaving existing liabilities of herself, and all property held by her, and all suits, unaffected by the revocation. (2 *Rev. Stat. art. 2, ch. 47, § 8.*)

§ 586. Instead of the common law tenancy by the curtesy, the husband, when there is issue of the marriage born alive, has an estate for his own life in all the real estate owned and possessed by the wife at the time of her death, or of which another may then be seised to her use; but he will hold the same subject to the

debts of his wife; and, after the death of her husband, the wife is endowed for *her life* of *one-third* of the real estate whereof he, or any one for *his use* was *seised* of an estate in *fee simple* at any time during the coverture, unless her right to such dower shall have been barred, forfeited, or relinquished. A divorce bars all claim to curtesy or dower. (2 *Rev. Stat. art. 4, ch. 47, §§ 1, 3, 15.*)

It seems that in order that the husband be entitled to the provision of the statute in his favor upon the death of his wife, there must be all the requisites to entitle the husband to curtesy at common law. The only essential difference between this provision and the provision of the common law is, that here the husband takes, in addition to the common law provision, a life estate in the real estate of which *another* is seised, to the use of the wife at the time of her death; and the entire estate is subject to the debts of the wife. (*Vide Oldham v. Henderson, 5 Dana's R. 257. Stinebaugh v. Wisdom, 13 B. Mon. R. 469. Welch v. Chandler, Ib. 431. Vanarsdale v. Fauntleroy's heirs, 7 ib. 401. Powell v. Gossam, 18 ib. 192. Payne v. Payne, 11 ib. 139. Mackey v. Procter, 12 ib. 435. Northcutt v. Whipp, Ib. 72. Neely v. Butler, 10 ib. 50. Orr v. Holliday, 9 ib. 69. Stevens v. Smith, 4 J. J. Marsh. R. 65. Johnson v. Johnson, 2 Metc. R. 331.*) The wife's dower, under the statutes of Kentucky, depends substantially upon the same circumstances which entitle a widow to her dower at common law; except that by the Kentucky statute the wife will have dower of real estate, although there may have been no actual possession, or recovery of possession, by the husband in his life-time. (2 *Rev. Stat. art. 4, ch. 47, § 5. And vide Northcutt v. Whipp, 12 B. Mon. R. 73. Hickman v. Irvine's heirs, 3 Dana's R. 122. Price v. Price's heirs, 6 ib. 107. Lawson v. Morton, Ib. 472.*) Another change made by the statutes of Kentucky with respect to dower is, that, whenever the husband has such an equity as will authorize the chancellor to decree a conveyance of the legal title to the husband, the widow is entitled to be endowed, while at common law she only had dower in lands to which the husband had legal title. (*Gully v. Ray, 18 B. Mon. R. 113.*) But it is the design here only to refer to such changes in the marital rights of husband and wife as are made by the statute, and hence but little is appropriate upon the general subject of curtesy or dower.

§ 587. If any stock in any of the banks or other corporations of the state is taken for or transferred to any female, and it is

expressed on the face of the certificate or transfer book of such stock that it is for the exclusive use of such female for her annual support, no husband she then has, or may thereafter have, shall take any interest in such stock, or the dividends therein; but if unmarried, she may dispose of it by will, or, if married, so dispose of it with the consent of her husband, or without such consent, if so provided in the deed or will creating the trust. She may also receive the dividends, and give acquittances therefor, as though unmarried; but she cannot in any way anticipate the same; nor can any dividend be paid upon any order or power given by her, before the same is declared.

It is further provided by statute, that if real or personal estate be conveyed or devised for the separate use of a married woman, or for that of an unmarried woman, to the exclusion of any husband she may thereafter have, she shall not alienate such estate with or without the consent of any husband she may have; but may do so where it is a gift by the consent of the donor or his personal representative. The alienation, however, of the separate estate of a married woman, is not forbidden, whether such estates were created before or since the passage of the statute, by a trustee under the express power in the will or deed creating such estates. But the separate estates of married women cannot be sold or incumbered.

A married woman may, by will, dispose of any estate secured to her separate use by deed, or in the exercise of a special power to that effect. So, also, married women may convey any real or personal estate which they own, or in which they have an interest, legal or equitable, in possession, reversion or remainder. The court ordering a sale of a married woman's lands, must cause the proceeds of the same to be *re-invested* in lands in or out of the state, subject to the same uses, limitations and trusts as the lands sold were held. (2 *Rev. Stat. art. 4, ch. 47, §§ 16, 17, 20, as amended, March 3, 1856.*)

A wife may dispose of her separate estate by will, and may make a will in pursuance of a power for that purpose. She may with the assent of her husband dispose of her personal estate. The grant of such a power is implied from his consent that she may make a will. A general assent is sufficient; this consent should be given to the probate court, because he may⁵ revoke his consent during the life of the wife, or at any time before probate.

When a will is made with the express consent of the husband, very little proof will be required to show the continuance of the consent. The statute of wills applies only to real estate, and though it does not confer on a *feme-covert* the power to devise real estate, it has never been held to prevent her from devising real estate under a power of appointment. (*George v. Bussing*, 15 *B. Mon. R.* 363. *Vide also Molly Yate's will*, 2 *Dana's R.* 216. *Priscilla Kelly's will*, 5 *B. Mon. R.* 373.)

The provision giving a *feme-covert* power to convey her real and personal estate, applies alone to the *general* property of married women. The *separate* estate of a *feme-covert* created since the adoption of the Revised Statutes, cannot be sold or incumbered but by an order of the court of equity; and these separate estates are included in the directions to this effect contained in section seven teen of the statute, equally with estates created before the adoption of the Revised Statutes. (*Stacker v. Whitlock*, 3 *Metc. R.* 244. *Stuart v. Wilder*, 17 *B. Mon. R.* 59.)

By section twenty of the Revised Statutes, married women can still convey their *general property*; and the section is comprehensive enough to embrace every conceivable interest or right which a married woman may have in property real or personal, and every kind of conveyance by deed. A deed of trust or mortgage either, is a conveyance by deed in the legal sense of that phrase in the statute. (*Smith v. Wilson*, 2 *Metc. R.* 237.)

The provision forbidding the separate estates of married women to be sold or incumbered, completely fetters the powers of a *feme-covert* to alienate such estate, and it may have the effect of limiting her expenditures to an outlay of the profits merely as they may accrue. Such a restriction may be considered severe in some cases; but, from the words of the statute, it is declared that there is no room left to doubt that such was the *intention* of the legislature, and that such is the law. The terms of prohibition are general, and embrace all *separate* estates.

It has been judicially declared that this provision of the Revised Statutes was enacted, not only to protect the rights of married women by securing their separate estates against their own improvidence, as well as all improper influences which might be attempted to be exercised over them, but also more effectually to secure the attainments of the object of the donor in their creation. Instead of depriving married women of any of their rights in their

separate estate, it tends to secure them in the possession and enjoyment of them. The power to violate the instrument creating her estate, and to make a disposition of the property embraced by it inconsistent with and calculated to defeat the evident intention of the donor in making her the object of his bounty, cannot be regarded as such a vested right in a married woman as to place it beyond legislative control or regulation. Indeed, the existence of such a power was only recognized in a court of equity, and the propriety of permitting its exercise unless it was expressly conferred by the instrument which created the estate, has been frequently questioned by the most enlightened chancellors.

Married women can still sell and convey their separate estates ; but it must be done as prescribed by the statute, and not otherwise, and, under the superintendence of a court of equity, when created before the 1st of July, 1852 ; and the proceeds must be invested for the same use as that contained in the conveyance or devise by which the separate estate was originally created. The mode in which the sale and conveyance are to be made is varied ; but the restriction is entirely consistent with the nature of the estate, and its operation is evidently advantageous to the owners of such property, by securing them in the continued enjoyment of it. As the proceeds of a sale, when made, are required to be reinvested for the separate use of the wife, she is thereby guarded against that influence to which her condition naturally subjects her, and which it is almost impossible for her to resist, by the withdrawal of all temptation for its exercise. (*Daniel v. Robinson*, 18 B. Mon. R. 306. *Williamson v. Williamson*, *Ib.* 385.) Before the act of 1852, therefore, the separate estate of a *feme-covert* could be sold and conveyed under the superintendence of a court of equity ; but, as the law now stands, it can be done only by consent of the donor. (*Stewart v. Wilder*, 17 B. Mon. R. 59. *Stone v. Guthrie*, 2 Metc. R. 520.) The husband cannot now bind the separate estate of his wife by mortgage, as his power over such estate is restricted by the statute. (*Stewart v. Wilder*, *supra*.)

§ 588. Where a creditor brought suit against the trustee of the wife to subject property conveyed to him in trust for the use, benefit and support of the wife and her children, and to permit her and her children to use, possess and enjoy every part and parcel of the property, and to be controlled by the wife for her comfort and support, to the exclusion of the husband, viz., to subject the

rent and hire of this property for debts created by the wife in the purchase of goods for the use of her family, and for which she and her husband had executed their notes, expressing upon their face the consideration, the court of appeals held that, under the Revised Statutes, this property was the separate estate of the wife, and that, therefore, she and her husband could not charge or incumber it in any way; and it was declared that the provision in the Revised Statutes concerning estates held in trust has no application to *separate* estates, which are sometimes more than mere trust estates. It only applies to estates that are, properly speaking, trust estates. A *separate* estate is peculiar in its character, and can only belong to a married woman, although it may be created previous to her marriage. The trust estates referred to in the acts are those that may belong to any person whatever; nor, has the provision of the Revised Statutes, which renders the real estate of the wife liable for such debts and liabilities contracted on account of necessities for herself and family, as may be evidenced by writing signed by her and her husband, any application to her separate estate. That provision relates to the wife's *general* property, as contradistinguished from her *separate* estate. The same chapter contains the provisions relating to her separate estate, which are wholly inconsistent with those concerning her other and general property, by which it clearly appears that a distinction between them was *intended* to be made and observed. (*Stone v. Guthrie*, 2 *Metc. R.* 520.) The right which a married woman acquires to property under the operation of the statute, to be protected in her *general* property, does not confer upon her the rights incidental to a *separate* estate in its legal acceptation. (*Johnson v. Jones*, 12 *B. Monroe's R.* 329. *Lillard v. Turner*, 16 *ib.* 376.) When there is a *general* property, such as that by descent, devised generally or conveyed by an ordinary deed of conveyance to the wife, not indicating a *separate estate*, the husband has certain well-defined marital rights vesting in him. (*Burgin v. Forsythe*, 17 *B. Monroe's R.* 555. *Petty v. Malier*, 14 *ib.* 247.) But a devise of rents and profits of land for the *separate* and sole use of the devisee during her natural life is, in substance and effect, an appropriation of the land itself, and is a *separate estate*, and embraced within the provisions of the statute, and the devisee has no power to convey or charge it. (*Williamson v. Williamson*, 18 *B. Mon. R.* 383.)

§ 589. The conveyance of the real estate of a *feme-covert* may be by the *joint* deed of husband and wife, or by separate instrument, but in the latter case the husband must first convey or have theretofore conveyed. The deed as to the husband may be acknowledged or proved and recorded as provided for in the preceding sections of the statute. A deed of a married woman to be effectual, must be acknowledged before some of the officers named in the statute, and recorded in the proper office. Previous to such acknowledgment, it is made the duty of the officer to explain to her the contents and effect of the deed separately and apart from her husband; and thereupon, if she freely and voluntarily acknowledge the same, and is willing for it to be recorded, the officer must certify the same in the form prescribed by the statute. (2 *Rev. Stat. art. 4, ch. 47, §§ 21, 22.*)

The provisions of the statute are sufficiently comprehensive to enable a married woman to make a deed of every description; she may join with her husband in an absolute deed of her estate to pay a debt, or in a mortgage to secure a debt, and a court of equity in such a case will not interpose to set it aside upon the ground that such estate was in fact exempt by law from liability for her husband's debts, if she voluntarily execute it in the form prescribed. (*Smith v. Wilson*, 2 *Metc. R.* 237.) But when the wife *joins* with the husband, it is merely a permission to him to sell her estate, and she is not bound by any covenant in the deed. (*Falmouth Bridge Company v. Tibbatts*, 16 *B. Mon. R.* 637. *Vide also Moore v. Moore*, 12 *ib.* 665.) If a deed be properly certified to pass the title of a *feme-covert*, and lodged by the grantee in the proper office in due time, it is effectual for all the purposes of a recorded instrument, even against a *feme-covert* grantor, though neither the deed nor certificate be recorded; and if a deed be *in fact* recorded in due time, though the certificate remains unrecorded, it effectually binds the *feme*. (*Gedges v. West. Bap. Theo. Inst.* 13 *B. Mon. R.* 535.)

§ 590. It may be added that the courts of Kentucky hold that, in the absence of express agreement, the law of the matrimonial domicile will govern the present property in that place, and all the personal property then in possession, wherever situated, as between husband and wife, provided the law of the place where such rights are sought to be enforced, does not prohibit such an arrangement; and that where there is a change of domicile after marriage, the

rights of ownership as between husband and wife to subsequently acquired personal property, will be governed by the law of the actual domicile; provided the local laws do not expressly prohibit the arrangement. (*Townes v. Durbin*, 3 *Metc. R.* 352.) The principle here enunciated would seem to be general in its application, and will, therefore, be recognized as binding in other states as well as in Kentucky.

The court of appeals of Kentucky have just made an important decision affecting the marital rights of women, though the rule laid down may not be peculiar to that state. The court have held in a case not yet reported, that a husband has no control over, and cannot open his wife's private correspondence. In pronouncing the opinion, the court said: "Nor would we admit that in this age and country, a husband's rightful authority gives him during marriage dominion over his wife's chaste and friendly correspondence, not affecting *his* rights; nor that in all the plenitude of his marital power he could, without her free consent, take from her or destroy or in any way control the possession or gift of such letters. Any such ungracious interference with her confidential correspondence would impair social confidence and disturb domestic peace, and ought not to be encouraged by the judiciary, especially as it could do no other good than to gratify a jealous and prying curiosity. According to befitting decorum, and in every valuable sense, such letters, written to her to keep and read and cherish, are hers; and if she, for reasons satisfactory to her own taste and judgment, choose not to give or show them to her husband, she has a right to keep them to herself as her own inviolable property, and a confiding wife will never withhold from a true husband her confidential letters without good and sufficient reason. The existing code of both British and American law recognizes the personal individuality and moral responsibility of wives, and consequently guarantees their freedom of thought and interchange of sentiment. Their ideas are their own; their emotions their own, and their affections their own. Here and now a husband must not be a tyrant, and ought not to be a spy on his wife who is neither his slave nor his mistress; but should always be his free and equal companion."

This is good reasoning and sound doctrine, and will be recognized as binding in every Christian state.

The legislature of Kentucky has recently made provision for additional facilities for the transaction of business by *femes-covert*, provided they can obtain the preliminary co-operation of their husbands. It is now provided that, on the joint petition of husband and wife, the court of chancery may, by order and decree, empower the wife to use, enjoy, sell and convey, for her own benefit, any property she may own, and to make contracts, sue and be sued, as a *feme-sole*, or to trade in her own name, or dispose of her own property by will or deed. (*Supplement to Rev. Stat. 1866, p. 728.*)

The peculiarities of the Kentucky statutes, in respect to divorce and alimony, will be noticed when the subject of marriage and divorce is considered.*

§ 591. In the State of Tennessee it is made lawful for a *feme-covert* to act in all respects as a *feme-sole* in all cases where the husband has been found by a jury to be insane and incapable to manage his own affairs, and the verdict of the jury shall have been confirmed by the county court. (*Laws of 1835, ch. 36, § 1.*) Marriage settlements between husband and wife are valid, provided no more property is concerned in them than the husband and wife had at the time of their marriage. All legacies made to the wife during coverture are regarded as her separate property. (*Laws of 1785, ch. 12.*) And a *feme-covert* may dispose of her own property by will. (*Laws of 1852, ch. 180.*) The real estate of a *feme-covert* is exempt from the debts of her husband during her life, and the husband and wife cannot be ejected from or dispossessed of the real estate of the wife. The proceeds of the wife's real estate cannot be paid to any person except by her consent upon privy examination by the court, or unless a deed or power of attorney is executed by the husband and wife, and her privy examination taken as in other cases. Her real estate cannot be sold during her life without her joining in the conveyance in the manner prescribed by law, in which married women shall convey lands. (*Code of 1858, §§ 2481-2486.*)

Certain household goods and other necessary property of a householder are exempt from execution, seizure or attachment; and when a debtor absconds and leaves his family, the same property is

* The labor of compiling the statutes and judicial decisions, in respect to marital rights, in Kentucky, has been greatly abridged by consulting Mr. Cord's work upon the legal and equitable rights of married women, in which the most of the statutes are literally transcribed, and the points settled by judicial authority are liberally given. (*Cord's Husband and Wife, 608-631.*)

required to be set apart for the use of the wife and family, and is exempt in the hands of the wife or children; and when the owner of such property dies, the same is exempt from execution in the hands of the widow and children. (*Code of 1858*, §§ 2107-2113.)

§ 592. The courts of Tennessee hold that the husband and wife, being tenants in common, if a wife consent to a sale of part of her interest in lands so held by them, and joins her husband in a conveyance, made according to the forms of law, without an understanding that the proceeds of the sale are to be held or vested for her use, or that she is to be remunerated out of the estate of her husband, all her interest in the estate is gone, and the husband holds the consideration for which it was sold in his own absolute right, discharged from any claim of hers, which might under other circumstances be paramount to his or that of his representatives, either real or personal. (*Ex parte Yarborough*, 1 *Swan's R.* 202. *And vide Chester v. Greer*, 5 *Humph. R.* 26.)

When the real estate of the wife was sold by a decree of the court, and the sale reported and confirmed, without a divestiture of title, the court held, that upon the death of the wife, the husband, as her administrator, was entitled to her share of the notes on hand for the purchase-money; that by the confirmation of the report the land was converted into personalty, to which the marital right of the husband would attach. (*Jones v. Walkup*, 5 *Sneed's R.* 135.)

The statute which protects the lands of the wife from the creditors of the husband is held to have reference alone to such lands as the husband may hold or claim in right of the wife. It applies only to cases where the fee is in the wife alone, and not to cases where they are jointly seised in fee. Where land is conveyed to husband and wife, the courts of Tennessee hold that they hold by entireties; but if land be conveyed to a man and woman, and they afterward marry, as they took originally by moieties, it is held that they will continue to hold by moieties after the marriage. (*Ames v. Norman*, 4 *Sneed's R.* 683. *Vide Young v. Lea*, 3 *Sneed's R.* 249.)

When a husband, having sold his wife's remainder or reversionary interest in property, gets possession by himself or his assignee during his life, upon the termination of the intervening estate, such sale will be good against the wife. (*Bugg v. Franklin*, 4 *Sneed's R.* 129.)

It is held, under the laws of Tennessee, that in no case can a *feme-covert* be sued, either separately or jointly with her husband, upon a mere personal contract made by her during coverture, although she live apart from her husband. (*Harris v. Taylor*, 3 *Sneed's R.* 536.)

The courts of Tennessee hold that the separate estate of a *feme-covert* cannot, in any case, be charged for debts, except on her express agreement to that effect. (*Cherry v. Clements*, 10 *Humph. R.* 552.)

When the wife rented land and made corn on it by the labor of slaves, secured to her separate use, the corn was held to belong to the wife, and was not subject to the husband's debts. Although a *feme-covert* will, most likely, never again be able, in Tennessee, to hold slaves as her separate estate, yet the principle decided in this case is important. (*Young v. Jones*, 9 *Humph. R.* 551.) A note or obligation, executed by a *feme-covert*, has been held by the courts of Tennessee to create no cause of action, and when the declaration shows this fact it is held that such declaration is bad on demurrer, and that the defect may be taken advantage of in arrest of judgment. (*Sheppard v. Kendle*, 3 *Humph. R.* 80.) It is also held, by the courts of Tennessee, that a deed from the husband to his wife, or *vice versa*, is absolutely void, and nothing is conveyed by it. (*Perry v. Gill*, 2 *Humph. R.* 218.)

§ 593. In the State of North Carolina, all real estate belonging to the wife at the time of her marriage, is exempt from sale on execution against the husband, and cannot be sold or leased by the husband except with the consent of the wife, acknowledged on a private examination; and the proceeds of her land sold by the court are secured to her separate use. A marriage settlement or contract may be made, but as to creditors it is invalid, if a greater value is secured to the intended wife and children than is received with her marriage, and the estate of the husband over and above his debts at the time of the marriage; and in any suit, the burden of proof is on the person claiming under the contract. A legacy to the wife in general words, and not as an interest in, or a distributive share of, an estate falling to her during coverture, is taken as a part of the portion received with the wife, if the estate of the husband and wife is not sufficient at the time of the marriage to make good the marriage contract. If the wife marry under the age of fifteen years, all her estate is secured to her separate use,

free from all control or dominion of her husband. (*Rev. Code, ch. 37, §§ 8, 11, 25; ch. 56, § 1; ch. 68, § 10.*)

It has been held by the courts in North Carolina that the words "for her sole and separate use," when applied in a will to an unmarried female, do not create any such separate interest as upon her marriage afterward, will prevent the property from vesting fully in her husband. (*Apple v. Allen, 3 N. C. R. 120.*) And, further, that the words in a will "to the only proper use and behoof of my daughter," do not secure to a *feme-covert* a separate estate so as to deprive the husband of his marital rights. (*Baron v. Holt, 2 Jones' Law R. 323.*)

In North Carolina, lands under a conveyance to husband and wife jointly, are held by the grantees by entireties, notwithstanding the act of 1784 abolishing the right of survivor. (*Motley v. Whitmore, 2 Dev. & Batt. R. 537.*)

The deed of a *feme-covert*, without a private examination, as directed by the act of assembly (*Rev. Stat. ch. 37, §§ 9-14*), is a mere nullity and void; and to give validity to her deed, it must appear that her private examination has been had pursuant to the act; if it appear by the clerk's certificate that "the deed was acknowledged in open court and ordered to be registered," the court will not presume a private examination from such certificate. (*Den v. Barfield, 2 Murph. R. 390. Vide also Green v. Branton, 1 Dev. Eq. R. 500. Burgess v. Wilson, 2 Dev. R. 306.*)

The deed of a *feme-covert* is void at common law, and can only be effectual when taken according to the statute. (*Sutton v. Sutton, 1 Dev. & Batt. R. 582. Gilchrist v. Brice, 1 Dev. & Batt. Eq. R. 346.*)

§ 594. In the State of South Carolina, a *feme-covert* may be a sole trader, in which case she is liable to be sued as if she were single, and she may appoint an attorney to bring a suit either in her own name or joined with her husband, in respect to her land or any other action, and her husband has no control over such suit. (*2 Stat. at Large, 587, § 16, 593, § 12.*) The will of a married woman is declared void by statute. (*3 Stat. at Large, 342, § 5.*)

In the State of South Carolina the courts hold that an insolvent husband may stipulate beforehand, that the proceeds of his labor shall be appropriated to the sole and separate use of his wife, and that such a stipulation is no fraud on his creditors. (*Hodges v. Cobb, 8 Rich. Law R. 50.*)

A married woman has no power, under the statutes of South Carolina, to release, before a magistrate, her interest in lands when it is less than an estate of inheritance. It seems, however, that she may release such an interest before a judge, as she may *any estate*. (*Hays v. Hays*, 5 *Rich. Law R.* 31. *And vide Reese v. Holmes*, 5 *Rich. Eq. R.* 531.)

The courts of South Carolina hold that when land is conveyed to husband and wife, they become seised of an estate in entirety, and that neither can alien so as to bind the other, and the survivor takes the whole. And it was held, in the same case, that the wife having an estate for life, and the husband and wife being seised of the remainder in entirety, the estate for life does not merge in the estate in remainder. (*Bonier v. Mullins*, 4 *Richardson's Equity R.* 80.)

§ 595. In the State of Georgia, all the real estate belonging to the wife at the time of her marriage, becomes vested in and passes to the husband in the same manner as personal property does; and in case of the death of the husband thereafter, intestate, the same descends and becomes subject to distribution in the same manner as personal property. (*Cobb's Dig. of 1851*, pp. 305, 306.) But in all cases where a married woman has been deserted by her husband, and has, while so deserted, by her exertions and those of her children or otherwise, acquired property of any kind, the same is declared to be exempt from the payment of her husband's debts, and shall be vested in such married woman for her sole and separate use, not subject to the debts, contracts or control of her husband. (*Laws of 1851, 1852*, No. 136.)

In Georgia, when persons intermarry, the statute provides that the husband shall not be liable for the debts of the wife further than the property received through the wife will satisfy; and the property received by the husband through the wife is in no case liable for the debts, defaults, or contracts of the husband existing at the time of the marriage. (*Laws of 1855, 1856*, No. 176.) And it is made lawful for any married woman to deposit in any savings bank or institution for savings, chartered in the State, any sums of money, the proceeds of her own labor, or that of her children, less than two thousand dollars taken in the aggregate, and to control, draw for, dispose of, devise or transfer, in any way whatever, the sum or sums thus deposited, in every respect as if she were not a married woman. (*Laws of 1865, 1866*, No. 230.)

§ 596. The courts have held that the act of 1845, "to change and point out the mode of inheritance, in certain cases therein mentioned," divests no right of a *feme-sole* who, before the passing of the act, was entitled to property by inheritance. The property vests in her. The marital rights of a husband who, after the passage of the act of 1845, intermarries with a lady having a child by a former marriage, and who is entitled to property by inheritance from a father who died anterior to the passage of that act, are regulated by that act, and attach to the part only to which the wife would be entitled under its provisions. (*Roby v. Boswell*, 23 Ga. R. 51.)

As the law stands in Georgia, upon marriage, the real, as well as the personal, estate of the wife vests in the husband, and his occupancy of the land is evidence that he had reduced it to possession, even if that were necessary to the consummation of his right (*Royston v. Royston*, 21 Ga. R. 161); although it would seem that a husband may give to his wife all his property, so that she can hold it against debts subsequently contracted. (*Horn v. Ross*, 20 Ga. R. 210.)

The courts hold that when a husband receives property as the separate estate of his wife, treats it as such, and in his will recites that, in consideration of that separate estate, he makes no other provision for her, his executor was estopped to deny the separate estate of the wife in the same. (*Williams v. Allen*, 17 Ga. R. 81.)

When a *feme-covert* possesses and enjoys all the rights and powers of a *feme-sole* over her separate estate, the courts hold that she must perform the corresponding obligations of one. (*Boston v. Cummins*, 16 Ga. R. 102.) It seems that, under the statutes of Georgia, a *feme-covert* may be constituted a *free dealer*, and, in such case, she is liable on all contracts made in respect to such business. (*Waters v. Bean*, 15 Ga. R. 358.)

§ 597. In the State of Florida, when any female who is a citizen of the state marries, or any female marries a citizen of the state, the female being seised or possessed of real or personal property, her title to the same continues separate and independent, and beyond the control of her husband, notwithstanding her coverture, and cannot be taken in execution for the debts of her husband, although the property of the female will remain in the care and management of the husband. So also married women may become seised or possessed of real and personal property, during coverture,

by bequest, devise, gift, purchase, or distribution. Any married woman having separate and independent title to property under the statute is not entitled to sue her husband for the rents, hire, issues, proceeds, or profits, of such property, and the husband is not allowed to charge the wife for his care and management of her property. The husband and wife must join in all sales and transfers of the property of the wife, and her real estate can only be conveyed by the joint deed of the husband and wife, duly attested, authenticated, and admitted to record, according to the laws of Florida regulating conveyances of real property. The wife may make a will if she is of full age. If the wife die in the state possessed of real and personal property, or of either species of property, the husband takes the same interest in her property, and no other, which a child would inherit; and if she die without children, then her surviving husband is entitled to administration, and to all her property, both real and personal. The wife is required to file an inventory of her property in the circuit court clerk's office, within six months after it is acquired, at the peril of its becoming liable to the debts of her husband; although the omission to file such inventory confers no rights upon the husband. Such are substantially the provisions of the statutes in Florida relating to marital rights. (*Thompson's Dig. pp. 219, 220, 221, 222.*)

The courts of Florida hold that the separate estate of a married woman is liable in equity for a debt contracted for the benefit of it. (*Smith v. Poythress, 2 Fla. R. 92.*) The courts also hold that the claimant of ganancial right under the laws existing in the province of Florida while it was a part of the Spanish dominion, takes the same, subject to the debts contracted during the marriage, which are to be paid out of the common property; he cannot take this property and leave the debts unpaid. (*McHardy v. McHardy, 7 Fla. R. 301.*)

§ 598. In the State of Alabama, all property held by the wife previous to her marriage, or which she became entitled to after the marriage, in any manner, is declared by statute to be her separate estate, and is not subject to the payment of the debts of the husband. The property belonging to the wife vests in the husband as her trustee, and he has the management of it, and is not required to account for the rents, income or profits thereof; but such rents, income and profits are not subject to the payment of the debts of the husband. The property of the wife may be sold by the husband

and wife and conveyed by them jointly, by an instrument in writing, attested by two witnesses. The proceeds of the sale, however, are declared still to be the separate estate of the wife. The husband may receive property coming to his wife, and his receipt therefor is declared to be a full discharge in law and equity. The separate estate of the wife is liable for articles of comfort and support of the household suitable to the degree and condition in life of the family.

Married women may, by last will and testament, dispose of their separate estate. But, on the death of the wife, the husband is entitled to one-half of the personalty of her separate estate absolutely, and to the use of the realty during his life, unless he has been divested of all control over it by a decree of a court of chancery, as provided by statute. If the husband of a *feme-covert*, having a separate estate, becomes incapable of or unfit for the discreet management and control of such separate estate, such husband may be removed from the trust by bill in chancery; and thenceforward the wife has the entire control of her separate estate, and may sue and be sued in her own name in respect to the same. And if, by reason of intemperance, the husband becomes unfit to manage such separate estate, it may be protected by an order of the court of chancery, in the same manner that the separate estates of married women are protected by the courts of chancery. (*Code of 1852, tit. 5, ch. 1, art. 3, §§ 1982-1995, 1998-2000.*)

§ 599. In the State of Alabama, the surviving husband of an intestate wife is entitled to one-half of her personal estate absolutely, and to the use of her realty during life, whether in possession or not. (*Marshall v. Crow, 29 Ala. R. 278.*)

If the husband abandon his wife, or, from imbecility, intemperance, or profligacy, is unfit for the management of his estate, or has wasted it, or from any cause has no estate but what the law exempts from sale by execution, and the wife shall, by her own industry, be able to maintain herself, or to accumulate property, she may obtain an order of the court of chancery to have her earnings and accumulations secured to her sole and separate use; and thenceforward she may act as a *feme-sole*, and as such she may hold real or personal estate, may buy or sell, sue and be sued. (*Code of 1852, tit. 5, ch. 1, §§ 2003-2005.*)

It is settled in the State of Alabama, that a valid gift of personal property to the separate use of a married woman may be made orally. (*Machen v. Machen, 38 Ala. R. 364.*)

The separate estate of a *feme-covert*, held under the provisions of the Code, can only be conveyed by her and her husband jointly, by an instrument of writing, attested by two witnesses, and cannot be subjected in equity to the payment of her debts and contracts. (*Warfield v. Raviesies*, 38 Ala. R. 518. And *vide Alexander v. Saulsbury*, 37 *ib.* 513.)

§ 600. The courts hold that the liability of the wife's separate estate "for articles of comfort and support of the household" (Code § 1987) is limited to the property owned by her at the time the contract is made. (*Raviesies v. Stoddart*, 32 Ala. R. 599.) And further that the provisions of the Code (§§ 1891-97) respecting the separate estates of married women do not apply to separate estates created by deed, either before or since the adoption of the Code. (*Carmon v. Turner*, 32 Ala. R. 483.)

A quitclaim bond executed since the passage of the "woman's law" of 1848, by which lands are conveyed to a married woman, creates in her a separate estate under the act. (*Fisk v. Stubbs*, 30 Ala. R. 335.) And when the husband conveys property to a trustee for his wife, she takes, as against him, a separate estate in the property. (*Spencer v. Godwin*, 30 Ala. R. 355.) By the statute, the "wife and mother" who has been deserted by her husband, has the power to prosecute or defend suits in the name of her husband. (Code § 2136.) Under this provision the court held that it must appear that the wife is a mother, and the husband a father, in order that the wife may act under it. (*Ex parte Cole*, 28 Ala. R. 50.)

The courts hold that under the Alabama statute, a *feme-covert* may charge her separate estate by a verbal or implied promise, for labor or property contracted for the benefit of such separate estate. (*Walker v. Smith*, 28 Ala. R. 569.)

When the wife is seised in fee simple of lands at the time of her marriage, her husband, by virtue of the marriage, takes at least an estate for life, which is a legal freehold subject to levy and sale under execution at law against him. (*Cheek v. Waldman*, 25 Ala. R. 152.)

§ 601. In the State of Mississippi, the legislature has enacted that any married woman may become seised or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as if her own property; provided the same does not come from the husband during coverture.

And the rents, issues, profits, products, and income of either real or personal estate, or both, owned by a married woman at the time of her marriage, or which may have accrued to her afterward, are declared by statute to inure to the wife as her separate property, and exempt from her husband's debts; a *feme-covert* may also purchase property, real or personal, with her own money, which she may have had at the time of her marriage, or which may have accrued to her afterward, either as rents, issues, or profits of her estate, or otherwise, and may take a conveyance thereof in her own name, and in like manner hold and enjoy the same as her separate property, and if the husband shall purchase property in his own name, with the money of the wife, he will hold the same as trustee for the use of his wife. (*Rev. Code of 1857, ch. 40, § 5, arts. 23, 24.*) It is further provided that all actions affecting the separate property of the wife may be prosecuted and defended in the joint names of the husband and wife, and in case of an action concerning her land she may defend alone, if her husband neglects to do so. (*Rev. Code 1857, ch. 4, § 5, art. 26.*)

The court of appeals of the state has held that this statute is a limitation of the marital rights of the husband, as they existed at common law, but that it does not restrict such rights beyond the express and positive language of the act, or by necessary implication therefrom. The court further held that the contract of marriage is not made an exception to the well settled rule of the common law, that the law of the place where contracts are entered into, unless made with a view to performance in another place, is to determine the relative rights and obligations of the parties. Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, and the same rule holds good as well to future acquisitions as to present property, where there is no change of domicile; but where there is a change, the law of the actual and not of the matrimonial domicile will prevail as to future acquisition of movable property, and, further, that national comity, being a principle of the law of nations, constitutes a part of the civil jurisprudence of every state. Therefore, when the rule is settled by which the right is to be determined, and which would prevail in the courts of Mississippi, where the contract was entered into, the court will ascertain the rule by which, under the "*jus gentium privatum*," the tribu-

nals of a foreign state would be guided in determining the rights of the parties arising out of the contract. Hence, though, by the laws of Texas, where the wife died childless, her next of kin succeed to her separate property, yet, as by the laws of Mississippi, where the contract of marriage was held in such event, the husband is entitled; in the conflict upon principles of settled law his rights must prevail. (*Lyon v. Knott*, 2 *Am. Law Reg.* 604.)

§ 602. In the State of Mississippi, all contracts made for necessities for the family, wearing apparel for herself and her children, by the wife, or by the husband with her consent, are made binding upon the separate property of the wife. (*Rev. Code* 1857, *ch.* 40, § 5, *art.* 25.) And any married woman may, either jointly with her husband, or separately, execute any bond which may be necessary, in any proceedings, either at law or in equity, to establish or enforce her right to property or to the profits thereof, and the same is declared binding upon her separate property. (*Rev. Code* 1857, *ch.* 40, § 5, *art.* 31.) The provisions of the statutes which empower a *feme-covert* to dispose of her separate estate in the mode therein prescribed, do not apply to a case where the wife did not acquire her separate estate under these acts. (*Andrews v. Jones*, 32 *Miss. R.* 274.)

The courts of Mississippi hold that the jewelry and furniture of the wife are paraphernal property, and may be sold by her, and the proceeds invested in other property in the name of a trustee, for her separate estate. (*Gully v. Hull*, 31 *Miss. R.* 20.)

The right of the widow to the personal estate of her deceased husband, exempt by law from execution, is a *chose in action*, and goes to a subsequent husband, under the rule of the common law, her interest therein not being protected by the acts of 1839 or 1846. The courts hold that those acts for the protection of married women only extend to the property enumerated in them. (*Lowery v. Herbert*, 30 *Miss. R.* 19.)

§ 603. In the State of Louisiana they have what is called a partnership or community of acquests or gains, which consists of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during marriage. The husband is the head and master of the community, manages its effects, disposes of the revenue, and may alienate the same. (*Civil Code*, §§ 2371, 2374.) The statutes of the state also provide that either of the married couple may, either by marriage contract,

or during the marriage, give to the other, in full property, all that he or she might give to a stranger. (*Rev. Stat. of 1856, p. 79, § 17.*)

It is further declared by statute that, in all cases, when either husband or wife shall die, leaving no ascendants or descendants, and without having disposed by will and testament, of his or her share in the community property, such share shall be held by the survivor in usufruct during his or her natural life; and when there are children of the issue of the marriage left with the survivor of husband or wife, the share of the deceased in the community property shall be held by the survivor in usufruct during his or her natural life; provided that such usufruct shall cease when the survivor shall enter into a second marriage. (*Rev. Stat. p. 103, § 2, and p. 104, § 2.*)

The statute further provides that the wife shall have a legal mortgage on her husband's immovables; but when, by a marriage contract, the parties, being of full age, shall agree that the legal mortgage of the wife shall exist only on one or more immovables belonging to the husband, all of the immovables and other property of the husband not included therein shall remain free and released from such legal mortgage; *provided* that the wife cannot legally stipulate that no mortgage whatever shall exist in her favor. (*Rev. Stat. p. 242, § 1.*) And the statute also declares that all married women over twenty-one years of age, may be authorized by their husbands to borrow money, or contract debts for their separate benefit and advantage, and secure the same by mortgage upon their separate estate, paraphernal or dotal; *provided* that the sanction of the judge of the district court be given to the same; and a *feme-covert* may also relinquish her rights in favor of third persons and may appoint agents to contract for her. (*Rev. Stat. p. 560, §§ 1-6.*)

§ 604. The courts of Louisiana hold that property bought with the funds of the wife, or acquired by her in consequence of a *datien en payement* made to her by her tutor, and which never came under her husband's administration, is her separate or paraphernal property. (*Dominiquez v. Lee, 17 La. R. 295.*)

The paraphernal property of married women is not bound for the debts contracted by the husband while at the head of the community. Neither are the fruits liable when the wife administers her own property. (*Lambert v. Franchebois, 16 La. R. 1.*)

The courts have declared that the partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and of the estates which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of one of the two, and not of both, because in that case the period of time when the purchase is made is alone attended to; and not the person who made the purchase. At the time of the dissolution of the marriage, all effects which both husband and wife reciprocally possess are presumed common effects or gains, unless satisfactorily proved which of such effects they brought in marriage, or have been given them separately, or they have respectively inherited. (*Huntington v. Legros*, 18 *La. An. R.* 126.)

All property which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage, or to belong to her at the time of the marriage, is paraphernal, and the wife has a right to administer personally her paraphernal property without the assistance of her husband. The wife has, even during marriage, a right of action against her husband for the restitution of her paraphernal effects and their fruits. (*Pecquet v. Pecquet*, 17 *La. An. R.* 204.)

The incapacity of the wife to contract, in Louisiana, is removed by the assent of the husband, but this is true only in cases where she can *legally* contract. For example, she can only contract with her husband in certain cases; she cannot, except in certain enumerated cases, dispose of her dotal property; she cannot, when there exists a community of acquets and gains between her and her husband, acquire property for her separate account. To this last rule there are exceptions. (*Bouligny v. Fortier*, 16 *La. An. R.* 209.)

§ 605. In the State of Arkansas any married woman may become seised and possessed of any property, real or personal, by direct bequest, devise, gift or distribution, in her own right and name, and as of her own property; provided, it does not come from her husband after coverture. And whenever the deed, bequest, grant, decree or other transfer of property of any kind, to any married woman, shall expressly set forth that the same is designed to be held exempt from the liabilities of her husband, such property and

the natural increase thereof will be deemed and considered as belonging exclusively to such married woman, exempt from the debts and liabilities of her husband. (*Dig. of 1858, ch. 111, §§ 1, 8.*) The courts of Arkansas hold that chancery has no jurisdiction to enjoin the sale of the property of the wife under an execution against the husband, when the wife, after the sale, would have an adequate remedy to recover back the possession of the property. (*Lovette v. Longmire, 14 Ark. R. 339.*) It is held that, under the general law of Arkansas, when personal property comes to the wife by distribution, the title vests in the husband, and the property is liable for his debts; and if in such a case, the wife sets up a separate estate in the property, under the statute of another state, such statute is a matter of fact to be established by competent evidence. (*Tatum v. Hines, 15 Ark. R. 180.*)

Whenever a perfect title, according to the laws in force in the state in which it is made, vests property in the wife, or in trustees for her use, such title is held to remain in her notwithstanding any change of residence of the husband, who may exercise an apparent control and ownership of the property, or any act of fraud or negligence on the part of the trustee or the husband; nor is she required to do any act to protect her title. And if her separate property is levied upon and sold for the husband's debts, no demand is held to be necessary to entitle the trustee to recover against the purchaser in an action of detinue. (*O'Neill v. Henderson, 15 Ark. R. 235. And vide McDaniel v. Grace, Ib. 465.*)

Under the statutes of Arkansas, the courts of that State hold that property may be conveyed by the husband directly to his wife; in which case the husband will take the legal interest and be treated in equity as a trustee for the wife. (*Dyer v. Bean, 15 Ark. R. 519.*)

It is held that a married woman may charge her separate estate in equity for the payment of a debt contracted by her. (*Oswalt v. Moore, 19 Ark. R. 257.*)

§ 606. The proceeds of the sale of the sole and separate property of the wife are to be regarded as her separate estate; and so are lands purchased with such proceeds, and they are subject to the same rules as was the original estate before it was sold and converted into a different species of property; and lands purchased with the separate means of the wife are not subject to execution for the debts of the husband. (*Kirkpatrick v. Buford, 21 Ark. R. 268. Allen v. Hightown, Ib. 316.*)

To enable a married woman to hold separate property under the married woman's law, it must be recorded as hers in the county in which she lives, by being scheduled under the law ; or, if devised, granted, decreed or transferred to her, it must be by words that expressly set forth that the property is to be held by her, exempt from the liabilities of her husband. (*Beeman v. Cowser*, 22 *Ark. R.* 429.)

The court holds that the wife has no legal authority to dispose of the husband's property by sale or otherwise, and to bind him by a contract without a power from him, or his subsequent approval or ratification. (*Dinnahoe v. Williams*, 24 *Ark. R.* 264.)

§ 607. In the State of Texas, parties intending to enter into the marriage state may enter into what stipulations they please, provided they be not contrary to good morals, or to some rule of law ; and in no case can they enter into any agreement, or make any renunciation, the object of which would be to alter the legal orders of descent, either with respect to themselves in what concerns the inheritance of their children or posterity, which either may have by any other person, or in respect to their common children, nor can they make any valid agreement to impair the legal rights of the husband over the person of the wife, or the persons of their common children. Every matrimonial agreement must be made by an act before a notary public and two witnesses ; and the same cannot be altered after the celebration of the marriage. (*Paschal's Annotated Dig. arts.* 4632, 4633, 4634.)

All property, both real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterward by gift, devise, or descent, as also the increase of all lands thus acquired, are declared to be his separate property ; and the rule is the same with respect to the wife, except that during the marriage the husband may have the sole management of his wife's property. All property acquired by either husband or wife during the marriage, except that which is acquired in the manner before specified, will be deemed the common property of the husband and wife, and, during the coverture, may be disposed of by the husband only ; it is made liable for the debts of both husband and wife, contracted during the marriage for necessities ; and upon the dissolution of the marriage by death, the remainder of such common property will go to the survivor, if the deceased has no child or children ; but if the deceased have a child or children, the survivor

will be entitled to one-half of said property, and the other half will pass to the child or children of the deceased. (*Paschal's Annotated Dig. arts. 4641, 4642.*)

The husband or wife may by last will and testament give to the survivor's husband or wife the power to keep his or her separate property together, until each of the several heirs shall become of lawful age, and to manage and control the same under the provisions of the statute, and such other restrictions as may be imposed by will; provided, the surviving husband or wife is the father or mother, as the case may be, of the minor heirs; and provided, further, that any child or heir entitled to any part of said property shall, at any time, upon coming of age, be entitled to receive his distributive portion of said estate. (*Paschal's Annotated Dig. art. 4653.*)

§ 608. The intention of the husband, in taking the conveyance of community property in the name of his wife, has no effect upon either his own or the rights of the wife. The law prescribes the operation of such deed, irrespective of the motives in taking it, in either the name of the husband or of the wife, or of both jointly; for, whether taken in the one form or the other, the community character of the property is not changed. (*Smith v. Strahan, 16 Tex. R. 314. But vide Higgins v. Johnson, 20 ib. 389.*)

Under the statutes as they now exist, the separate property of the wife cannot be charged with the debts of the husband contracted for necessities for himself, although it may be bound for necessities bought by her for herself and children; but she is not bound to support her husband, and necessities procured by him for himself cannot be charged upon her property. (*Magee v. White, 23 Tex. R. 180. Vide Brown v. Ecter, 19 ib. 346.*)

The rights of husband and wife to property acquired during coverture are precisely equivalent; the only difference being that he has the management and control of it, for the benefit of both. But where the husband leaves his home and is absent for several years, the wife acquires a right to manage, control, and dispose of the common property, as well as her separate property. And when the husband was absent for nearly six years, and, in the mean time the wife had purchased a tract of land, and made a deed of gift of a portion of it to her child by a former husband, the deed of gift was sustained by the court. (*Wright v. Hays, 10 Tex. R. 130. And vide Fullerton v. Doyle, 18 ib. 3.*)

It has been held that when the wife, without good cause, voluntarily abandons her husband for several years (say three or four) immediately previous to his decease, she forfeits her claim to the homestead and widow's allowance. (*Earle v. Earle*, 9 *Tex. R.* 630.)

The relation between husband and wife is such that the wife is often called upon to act as the impliedly authorized agent of the husband, even in the management of his own property; more especially may she manage and control her separate property during his absence. (*Blanchet v. Dugat*, 5 *Tex. R.* 507.)

§ 609. Husband and wife are not regarded as one person under the laws of Texas; the existence of the wife is not merged in that of the husband. Most certainly is this true, so far as the rights of property are concerned; they are distinct persons as to their estates; when property is in question, the husband is not a baron, nor is the wife a covert, if by the former is meant a lord and master and by the latter a dependent creature under protection or influence. The husband and wife are co-equals in life; and at death the survivor, whether husband or wife, remains the head of the family. Hemphill, Ch. J., in giving the opinion of the court, remarked: "The staunchest advocates of the doctrine of *woman merger* during the existence of the marriage, will not assert that the sex, of itself, disqualifies a female from being the head of a family. Even the common law, hostile as it is to the rights of married women, confers on the single woman, or spinster, as she is termed, the civil rights and capacities of man. She requires no guardian to protect her person or property. In legal contemplation and in fact, she is capable of managing and disposing of her possessions and interests prudently and advantageously. The statute does not declare that the head of the family must be of the stronger sex; and the occupant, whether of the one sex or the other, is entitled to all the rights and exemptions pertaining by law to the position." On this reasoning the court held that, at the death of the husband, the surviving wife becomes the head of the family; and, in the absence of the act requiring the probate court to set apart certain property for the sole use and benefit of herself and children, she would nevertheless be entitled to retain out of the community property, the homestead and other property which is exempted from forced sale; and that the one hundred and second section of the act of 1848 (*art.* 1211), must be construed with reference to existing laws on the subject of exemptions; and,

be its expressions or constructions what they may, they cannot affect the homestead guaranteed by the constitution to every head of a family. (*Wood v. Wheeler*, 7 *Texas R.* 13.)

And it seems that the husband may make a valid bill of sale or deed of gift to his wife, which will be enforced against his heirs. (*Hartwell v. Jackson*, 7 *Texas R.* 576.)

§ 610. By the common law, during coverture, the separate legal existence of the wife is extinguished; and, as a consequence, suits in relation to her rights must be in the joint names of husband and wife, and he may sue alone for all such property of the wife as he can dispose of for his own use. When the suit is in relation to the separate estate of the wife, the suit must be brought by the wife alone, in the name of her next friend. If she be joined with her husband, or the suit be brought in his name as next friend, the suit will be regarded as that of the husband alone, and will not prejudice the separate interest of the wife, nor bar a subsequent suit by her next friend; and, as a consequence of this right of the wife, the defendant may demur unless the suit be brought in the name of the wife by her *prochein ami*. But the courts of Texas hold that these distinctions, and the grounds on which they proceed, are unknown to their system of jurisprudence. The right of the wife in her own property cannot be affected under their laws by the circumstance of the joinder of the husband in a suit for its recovery. Let it be recovered by whom and how it may, it remains unchanged, the absolute property of the wife. By the statute of 1840, article 2415, it is declared that the husband may sue either alone, or jointly with his wife, for the recovery of any effects of the wife. This vests him with authority to prosecute the suit in his own name, or by joinder with the wife at his option. The law constitutes him her agent or attorney in this particular; and his acts in this capacity, done in good faith, must be binding and conclusive upon his principal. She would be entitled to no redress for errors in the proceedings, of which he could not avail himself. If he were incompetent, or was endangering the rights of his wife by negligence, the court would, doubtless, on proper representation, interfere for her protection; or if he were guilty of fraud or collusion, she might impeach the decree vitiated by such fraud. But the husband should then be made defendant, and not a co-plaintiff with his wife. (*Cannon v. Hemphill*, 7 *Texas R.* 184. *And vide Baxter v. Dear*, 24 *ib.* 17.)

§ 611. Whether the authority of the legislature to pass laws more clearly defining the rights of the wife to her separate property, and to the community property, is the same in respect to property acquired before the adoption of the Constitution, as it is in respect of property acquired afterward, seems to be a question not definitely settled. But the courts hold that the principles and rules of the common law, as to the effect of coverture, so far as they affect the capacity of the wife to hold property in her separate right, are totally expunged from their code of jurisprudence, and, in an investigation of the rights of the wife, must be altogether discarded from consideration. The capacity of the wife to hold property in her own right, separate and apart from her husband, is as complete and perfect as that of the husband to hold property in his own right, separate and apart from his wife. There is not the slightest difference, in this particular, between their civil rights and capacities. (*Edrington v. Mayfield*, 5 *Texas R.* 363.)

It has been judicially declared that it was the obvious purpose of the act of 1840, which introduced the common law, to preserve from the wreck of the Spanish system of jurisprudence those rules, with some modifications, which regarded the matrimonial union, so far as property was concerned, as a species of partnership, in which each partner might have separate estates or property, as well as common stock of acquisitions and gains. The distinction between the separate property of the wife and property limited to her sole and separate use, is not recognized by the Texas laws. The property denominated separate is regarded as limited to the sole and separate use of the wife, and necessarily excludes the common law rights of the husband in such property by virtue of the coverture. (*Cartwright v. Hollis*, 5 *Texas R.* 152.)

But the marital rights of persons in the state, married before the introduction of the common law, are to be regulated by the law "as it aforetime was." (*Smith v. Smith*, 1 *Texas R.* 621. *And vide Portis v. Parker*, 22 *ib.* 699.) The private property of each partner to the matrimonial union must, as a general rule, bear its own charges and expenses. (*Womack v. Womack*, 8 *Texas R.* 397.)

§ 612. Property purchased during the marriage, whether the conveyance be made to the husband or wife separately, or to them jointly, is presumed to belong to the community. This presumption may be rebutted by clear and satisfactory proof that the purchase was made with the separate funds of either husband or wife;

in which case it remains the separate property of the party whose money was employed in the acquisition. It seems that, in order to rebut the presumption that property purchased during marriage is common property, where a creditor is concerned, it must be shown that the funds with which the purchase was made were owned by the claimant before the marriage, or were acquired by gift, devise or descent, or that such funds were the proceeds of property thus acquired. (*Huston v. Curl*, 8 *Texas R.* 239. *Mitchell v. Marr*, 26 *ib.* 329.)

A married woman was capable of receiving a concession of land by onerous title under the colonization laws of Mexico and Coahuila and Texas; and such a grant became community property, and the husband could dispose of it in any mode not intended to defraud the wife. (*Edwards v. James*, 7 *Texas R.* 372.)

The law creates a presumption that all property held by husband and wife is common property and subject to the payment of the debts of the husband. (*Lott v. Keach*, 5 *Texas R.* 394.) But there is no presumption that property in the possession of a conjugal partnership belongs to the husband rather than to the wife. When the matrimonial union has continued for any considerable period, the presumption is strong that the property belongs to the common stock of acquets and gains. (*Edrington v. Mayfield*, 5 *Texas R.* 363.)

§ 613. The general rule is, that, when a wife joins her husband in a mortgage of her estate, for his benefit, as between the husband and wife the mortgage will be considered the debt of the husband; and after his death, the wife, or her representatives, will be entitled to stand in the place of the mortgagee, and have the mortgage satisfied out of the husband's assets. But when the forms of law are all complied with, the courts will examine with vigilance transactions in which the wife disposes of or charges her separate property, and protect her from undue influence, or the fraud or compulsion of her husband and others; but such fraud or compulsion must be averred by the wife, and be sustained by proof, in an action to set aside a conveyance. (*Hollis v. Francois*, 5 *Texas R.* 195.)

A married woman in Texas cannot make a contract by which she herself, or her separate property, will be rendered liable. The act of 1840, "regulating marital rights," was intended to secure the separate property of the wife, and its object would be defeated if

she could bind it by her separate contracts during the coverture. The common law rule respecting the capacity of the wife to contract was not changed by the statute. (*Kavanaugh v. Brown*, 1 *Texas R.* 481.)

The wife loses many of her civil rights by marriage. The law has deemed it sound policy, and beneficial to her interest, that certain onerous restrictions should be imposed upon her ability to deal with her separate estate. And if it be shielded from her voluntary disposition, *a fortiori*, would it be protected against debts, engagements or contracts of her husband, unless made for the benefit of such estate, or under certain circumstances, for the support of the wife and family. The constitutional provision, that "laws shall be passed" more clearly "defining the rights of the wife, in relation as well to her separate property as to that held in common with her husband," cannot, in any degree, have been intended to abridge the rights of the wife in her separate estate. (*Edrington v. Mayfield*, 5 *Texas R.* 363.)

It seems that the separate property of the wife is liable to respond in damages for the frauds in which she participates, in relation to her own property, and which inure to her exclusive benefit. (*Howard v. North*, 5 *Texas R.* 290.) The distinction, in some of the cases, exempting the separate estate of the wife from liability, because credit is given to the husband and not to the wife, has been declared to be frivolous in Texas. (*Cartwright v. Hollis*, 5 *Texas R.* 152.) The privy examination of the wife apart from her husband is indispensable to the conveyance of the separate property of the wife. (*Callahan v. Patterson*, 4 *Texas R.* 61.) A married woman can, jointly with her husband, make a valid conveyance of lands, her separate property, by an attorney in fact duly appointed and authorized by power of attorney, executed and acknowledged in the manner prescribed by law for the execution and acknowledgment of deeds of conveyance. (*Patton v. King*, 26 *Texas R.* 685.)

A husband may make a gift or grant of the community, or his separate property, to his wife, by a conveyance directly to her, without the intervention of trustees. And a deed from the husband to his wife, purporting to be for a valuable consideration, if without consideration, will be upheld as a donation or gift. (*Story v. Mitchell*, 24 *Texas R.* 305. And *vide Reynolds v. Lansford*, 16 *ib.* 286. *Bennett v. Cocks*, 15 *ib.* 67. *Fitts v. Fitts*, 14 *ib.* 443.)

§ 614. On the death of the wife without children, the community property belongs to the surviving husband, and neither the county court nor the administrator of the wife can exercise any control over it; and it would seem that, in such case, the husband is not required to file an inventory and appraisement under the statute of 1848, better defining the marital rights of the parties. (*Wall v. Clark*, 19 *Texas R.* 321. *And vide Fishback v. Young*, *Id.* 515.) The statute of 26th August, 1856, provides, "that it shall not be necessary for any surviving husband to administer upon the community property of himself and his deceased wife, but he shall have the exclusive management, control and disposition of the same after her death, in the same manner as during her life, subject to the provisions of this act." The third section of the act requires the husband, in the event his wife had a surviving child or children, to file an inventory of the common property. The fifth section empowers the county court to require a bond from the husband, or to "appoint administration over the estate, as in other cases," upon the heirs of the wife, showing that the "husband is wasting or mismanaging, or is about to waste or mismanage, said community property, or is about to remove it out of the state, or otherwise dispose of it in such manner as to injure or defraud the right of such heirs." (*Laws of 1856, Adjourned Session, page 51.*) This law was in force when the case of *Wall v. Clark*, *supra*, was decided, and the statute received a construction, in the decision of the case, as above indicated.

The husband has authority, as survivor of the connubial partnership, when there is no administration upon the wife's estate, to fulfill all contracts respecting the common property, entered into by himself alone or jointly with the wife, before her death; and where the heir of the wife sought to set aside a conveyance of the surviving husband, which was made in pursuance of such prior agreement by the husband and wife, on the ground that the contract had been forfeited by the obligee, and become null during the life of the wife, it was held by the court that he must make strict proof. (*Primm v. Barton*, 18 *Texas R.* 206.)

§ 615. When the husband is absent, leaving no one else authorized to take care of the common property, the wife has the implied authority to do so. In such a case, there is no reason or rule of law that would prohibit the wife from making such contracts

respecting the community property as are necessary for its preservation and the support of herself and children.

When the husband kept a hotel, which was the common property of himself and wife, and, being arrested for crime, broke jail and escaped, and the wife, alleging that she was in a state of destitution, rented the hotel for a year for a reasonable rent in money and board for herself and children, it was held that she had authority to do so, and that the contract was such as the circumstances justified, and, where the circumstances exist which give the wife authority to make contracts during the absence of the husband from his home, it would seem that her contracts may be proved or acknowledged in the same manner as those of a *feme-sole*, and that a privy examination is not essential to give them effect. (*Cheek v. Bellows*, 17 *Texas R.* 613.)

§ 616. Where the deed to real property is taken in the name of the wife, and part only of the purchase-money or consideration is her separate property, and her husband gives his note for part of the purchase-money, upon which judgment is afterward obtained, without making the wife a party to the suit, a sale by virtue of execution on such judgment will only pass the interest of the community, and the separate interest of the husband, if any, and not the separate interest of the wife, corresponding to the proportion of the consideration paid out of her separate property. (*Clairborne v. Tanner*, 18 *Texas R.* 68.)

It has been judicially declared that if there be any good sense in the rule, that, when credit is once given to the wife, the husband will not be liable, though the articles be necessary, it is in cases where the wife has a separate income, or separate property of her own, and under her own control.

The liability of the husband for necessities furnished the wife, is not affected by the fact that she had, without allegation of fault on her part, deserted her husband's house, and was taking measures to procure a separation of the marital relation, of all which the party plaintiff had notice, and dealt with the wife as if the separation had been then obtained, taking her note for the amount of the debt incurred; nor by the further fact, taken in connection therewith, that since the necessities were furnished, the wife had procured a separation and a separate maintenance amply sufficient for her support and the payment of this demand. And it would seem that the wife would be entitled in many instances to necessities, that

is, that the husband would be liable for necessities furnished her, although the separation may have been by her fault; as, for instance, where her separate property is under her husband's control, or there is a sufficient amount of common property; and where the wife is separated from the husband without fault on her part, her husband's express prohibition to furnish a given article is declared to be entitled to little or no weight. (*Black v. Bryan*, 18 *Texas R.* 453.)

The constitution of the state declares that a homestead for the head of a family, not exceeding two hundred acres of land, not included in a town or city, shall be exempt from sale on execution, and there have been several decisions of the court in respect to this provision; but it is thought to be unnecessary to refer to them. It has been held that the design of the exemption was not only to protect citizens and their families from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals, those feelings of sublime independence which are so essential to the maintenance of free institutions. The provision does not exempt from forced sale, two hundred acres of land, not included in a town or city, for a homestead; but a homestead not to exceed two hundred acres. (*Franklin v. Coffee*, 18 *Texas R.* 413. *Vide also on the subject of the homestead, Paschal v. Cushman*, 26 *ib.* 74. *North v. Shaver*, 15 *ib.* 175. *Baxter v. Dear*, 24 *ib.* 17. *Stanley v. Greenwood*, *Ib.* 224. *Norris v. Duncan*, 21 *ib.* 594.)

Such are the distinctive peculiarities created by statute in the several states relating to married women and marital rights, and the leading decisions of the courts under the statutes of each state. It will be observed that there is a considerable variety in the statutory provisions, and yet the decisions of the courts upon the subject may often be consulted to great advantage in construing the local statute of any particular state.

CHAPTER XXXVIII.

THE INSTITUTION OF MARRIAGE—HOW MARRIAGE IS REGARDED IN LAW—DIFFERENT VIEWS UPON THE SUBJECT—SOLEMNIZATION OF MARRIAGE.

§ 617. **MARRIAGE** is the conjugal union of one man with one woman for life. The institution of marriage is an ancient and honorable one, and the marriage relation exists in all Christian communities especially, and, in some form, it is almost universally recognized among the heathen. In Protestant communities, marriage is not regarded as a sacrament, nor as peculiar to the church of Christ; but it is considered in all countries as the most sacred of all contracts, and in England it is celebrated as a religious ceremony. In the United States, it is only a civil contract, and certain magistrates, equally with the ministers of religion, have a right to solemnize it; but the prevailing practice among the cultivated and refined is to have it performed by a clergyman, and attended with religious ceremonies.

Marriage is of a public nature, and the welfare of civil society, the happiness of families, and the credit of religion, are deeply interested in it. Indeed, the institution of marriage is really the most important of all the domestic relations. It is emphatically one of the chief foundations of social order; it involves moral duties and legal obligations of a most serious concern; and the ties and relations which result from it, are of the highest importance to the parties and to society. It is regulated by law in every civilized commonwealth, and all good citizens are bound by the regulations which are made. In all civilized countries, especially, the doctrine is conceded that men and women ought not to follow their animal instincts in their social relations to one another, but that they should be conjugally united by a band which nothing but death can sunder. In some countries men are permitted to take to themselves more than one wife; but the practice is looked upon with horror and disgust among Christian communities, and it is nowhere tolerated in a Christian country except by the Mormons of the United States.

Mr. Bishop, in his excellent commentaries upon the law of marriage and divorce, well says: "The institution of marriage, commencing with the race, and attending man in all periods, in

all countries, of his existence, has ever been considered the particular glory of the social system. It has shone forth in dark countries, and in dark periods of the world, a bright luminary on his horizon. And but for this institution, all that is valuable, all that is virtuous, all that is desirable in human existence, would long since have faded away in the general retrograde of the race, and in the perilous darkness in which its joys and its hopes would have been wrecked together. And as man has gone up in the path of his improvement, and higher and purer light has shone around him, still has this institution of marriage, receiving accessions of glory with every step of the race toward its ultimate glory, remained ever the first among the institutions of human society. And the idea that any government could, consistently with the general weal, permit this institution to become merely matter of bargain between men and women, and not regulate it by its own power, is too absurd to require a word of refutation." (1 *Bishop on Marriage and Divorce*, § 12.)

Marriage in South Carolina is declared to be "a civil contract of mutual partnership and cohabitation during life, under the provisions of laws passed on this subject. The parties are the man, the woman and the state. The state is interested, her interest being that the contract shall be fulfilled beneficially to the progeny, of whom the future citizens are to be composed." (2 *S. C. Stat. at Large*, 733.)

§ 618. Marriage is considered by the law in no other light than as a civil contract. This is the doctrine now universally conceded both in England and America. Whatever question or controversy may exist among legal writers and jurists concerning the nature of the relation subsisting between husband and wife after marriage—whether the rights and liabilities of the parties are then to be regulated and governed by the principles applicable to all civil contracts, or the contract is to be considered as merged in the higher nature of the status created by the agreement of the parties—all the authorities concur in this, that marriage has its origin and foundation in a purely civil contract. But while it is undoubtedly a contract, it is a contract sanctioned by law, controlled by considerations of public policy vital to the order and harmony of social life, and in its nature indissoluble, except by violations of duty on the one part, to be taken advantage of in a special manner, provided by law, on the other.

Some writers prefer to treat marriage rather as a *status* than as a contract; and Judge Story seems to have sanctioned this view. He says, in his work on the conflict of laws: "I have throughout treated marriage as a contract in the common sense of the word, because this is the light in which it is ordinarily viewed by jurists, domestic as well as foreign. But it appears to me to be something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts. * * * Marriage is not treated as a mere contract between the parties, subject, as to its continuance, dissolution, and effects, to their mere pleasure and intentions. But it is treated as a civil institution, the most interesting and important in its nature of any in society." (*Story's Conflict of Laws*, § 200.) And Mr. Bishop says: "Definitions are not necessarily law; and legal writers are bound to reform definitions as lexicographers do, so that they may truly describe the object intended. Thus, to say that marriage is a contract, when speaking of the marital condition, not of the agreement to assume it, is, as we have seen, according to the current of authorities, inaccurate, since they further declare that it differs in many particulars from other contracts. And, when the differences are pointed out, we find that they have covered every quality of the marriage, and left nothing of the contract uncovered. All is submerged in the *status*. To term marriage, therefore, a contract, is as great a practical inconvenience as to call a certain well known engine for propelling railroad cars 'a horse,' adding, 'but it differs from other horses in several important particulars,' and then to explain the particulars. More convenient would it be to use at once the word locomotive." (1 *Bishop on Marriage and Divorce*, § 18.) He, therefore, designates the relation of marriage in his work by the words "*status of marriage*," to signify the same thing which is usually meant by the phrase "contract of marriage."

§ 619. Mr. Shelford, in his treatise on marriage and divorce, says: "Marriage is considered in every country, and may be defined to be a contract according to the form prescribed by the law, by which a man and woman, capable of entering into such a contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist

between a husband and his wife." (*Shelford's Marriage and Divorce*, 1.)

Mr. Rogers, in his work on ecclesiastical law, says: "Marriage is a contract having its origin in the law of nature antecedent to all civil institutions, but adopted by political society, and charged thereby with various civil obligations. It is founded on mutual consent, which is the essence of all contracts; and is entered into by two persons of different sexes, with a view to their mutual comfort and support, and for the procreation of children." (*Rogers' Ecclesiastical Law* [2d ed.], 595, *tit. Marriage*.)

Ayliff says: "Marriage is a lawful coupling and joining together of a man and woman in an individual state or society of life, during the life-time of one of the parties; and this society of life is contracted by the consent and mutual good will of the parties toward each other." (*Ayliff's Parergon, juris canonici Anglicani*, 359.)

Lord Robertson, a Scotch judge, said: "Marriage is a contract *sui generis*, and differing, in some respects, from all other contracts, so that the rules of law which are applicable in expounding and enforcing other contracts may not apply to this. The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of parties; but it differs from other contracts in this, that the right, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation over which the parties have no control by any declaration of their will. It confers the *status* of legitimacy on children born in wedlock, with all the consequential rights, duties and privileges thence arising. It gives rise to the relations of consanguinity and affinity. In short, it pervades the whole system of civil society. Unlike other contracts, it cannot, in general, among civilized nations, be dissolved by mutual consent, and it subsists in full force, even although one of the parties should be forever rendered incapable, as in the case of incurable insanity, or the like, from performing his part of the mutual contract. No wonder that the rights, duties, and obligations arising from so important a contract should not be left to the discretion or caprice of the contracting parties, but should be regulated, in many important particulars, by the laws of every civilized country." (*Duntz v.*

Levitt, Ferg. R. 68, 385, 397.) And Lord Bannatine, another Scotch judge, in the same case, said: "Though the origin of marriage is contract, it is in a different situation from all others. It is a contract coeval with and essential to the existence of society, while the relations of husband and wife, parent and child, to which it gives rise, are the foundation of many rights acknowledged all the world over, and which, though differently modified in different countries, have everywhere a legal character altogether independent of the will of the parties." (*Duntz v. Levitt, Ferg. R.* 401.)

§ 620. Chief Justice Robertson, of Kentucky, observed: "Marriage, though in one sense a contract, because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds, is nevertheless *sui generis*; and, unlike ordinary or commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore, as every well organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the state, and cannot, like *mere contracts*, be dissolved by the mutual consent only of contracting parties, but may be abrogated by the sovereign will, either with or without the consent of *both parties*, whenever the public good, or the justice to both or either of the parties, will be thereby subserved. Such a remedial and conservative power is inherent in every independent nation, and cannot be subjected to political restraint or foreign control consistently with the public welfare. And therefore, marriage, being much more than a contract, and depending essentially on the sovereign will, is not, as we presume, embraced by the constitutional interdiction of legislative acts impairing the obligation of contracts. The obligation is created by the public law, subject to the public will, and not to that of the parties." (*Maguire v. Maguire, 7 Dana's R.* 181, 183.)

So, the judge who delivered the opinion of the court of Tennessee, in a case, observed: "By the English canon and ecclesiastical law, this union of marriage is of a nature so widely differing from ordinary contracts; creating disabilities and conferring privileges between husband and wife; producing interests, attachments and feelings, partly from necessity, but mainly from a principle in our nature, which together form the strongest ligament in human

society, without which, perhaps, it could not exist in a civilized state; it is a connection of such a deep-toned and solemn character that society has even more interest in preserving it than the parties themselves. So it has been deemed in all societies, civilized and not corrupt, in all ages." (*Dickson v. Dickson*, 1 *Yerg. R.* 110, 112.) So also in a case in the State of Delaware, the court remarked: "The marriage contract is one of a peculiar character, and subject to peculiar principles. It may be entered into by persons who are capable of forming any other lawful contract; it can be violated and annulled by law, which no other contract can; it cannot be determined by the will of the parties, as any other contract may be; and its rights and obligations are derived rather from the law relating to it, than from the contract itself." (*Townsend v. Griffin*, 4 *Harring. R.* 440, 442.) And in a late case in the State of Rhode Island, Chief Justice Ames observed: "*Marriage*, in the sense in which it is dealt with by a decree of divorce, is not a contract, but one of the domestic relations. In strictness, though formed by contract, it signifies the *relation* of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to those, uncontrollable by any contract which they can make. When formed, this relation is no more a contract than a 'fatherhood' or 'sonship' is a contract. It is no more a contract than serfdom, slavery and apprenticeship are contracts; the latter of which it resembles in this, that it is formed by contract. To this relation there are two parties, as to the others; two or more interested, without doubt, in the existence of the relation, and so interested in its dissolution. These parties are placed by the relation in a certain relative state or condition under the law, as are parents and children, masters and servants; and as every nation or state has an exclusive sovereignty and jurisdiction within its own territory, so it has exclusively the right to determine the domestic and social condition of the persons domiciled within that territory. It may, except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate *them*, and so the *legal* obligation of the relation which involves them, altogether. This it may do, with the exception above stated, as to some relations, by *law*, when it wills, declaring that the legal relation of master and slave, for instance, shall cease to exist within its

jurisdiction; or for what cause or breaches of duty in the relation, this or the legal relation of husband and wife, or of parent and child, may be restricted in its rights and duties, or altogether dissolved, through the judicial intervention of the courts." (*Ditson v. Ditson*, 4 R. I. R. 87, 101, 102.)

But in a recent case in Pennsylvania, the statement of an auditor was sanctioned by the court, when he observed: "In this commonwealth marriage, in its legal aspect, is, emphatically, a civil contract, and nothing more. The precepts of religion and morality may add to its solemnity, but they have nothing to do with its civil obligations. Even the restrictions arising from consanguinity, or from a prior existing engagement of the same nature, or from other incapacities to contract, derive their validity from the enactments which follow the dictates of religion, and not from those dictates themselves. The essence of the engagement consists in a consent, freely given, by parties competent at the time to contract." (*Physick's estate*, 4 Am. Law Reg. [N. S.] 418, 423, 432. *Vide also Hautz v. Seely*, 6 Binn. R. 405.)

§ 621. The late learned surrogate of the city of New York said:

"Though marriage is a civil contract, it differs from other contracts, in being also a civil institution. It lies at the very basis of society, and the state is interested in its regulation. In respect to rights, duties and obligations, the will of the parties is not supreme, but is subject to those rules of social and moral order which the law has seen fit to impose. Thus it still continues to subsist, though one of the parties has become incapable of performing his part of the compact. It cannot be dissolved by mutual consent. In cases of other contracts these rules would be esteemed grossly unjust; in respect to marriage, they are recommended by the highest considerations of morals and humanity.

"It is evident, also, that the relations and conduct of husband and wife are of such concern to the state that the law of the place where they reside cannot be made entirely subservient to the law of the place where the contract was made. If marriage be such a contract as to embody in it all the laws respecting husband and wife existing at the time of its creation, so that these laws are part of the contract, just as much as if they were expressed in a written agreement, then it is obvious that parties domiciled and married abroad may import into any country to which they may have

changed their domicile laws utterly repugnant to its social policy and institutions." (*Kelly v. McCartney*, 3 *Brad. R.* 7, 9, 10.)

The marriage relation is sometimes confounded with the *contract* under which the relation is entered into, and, perhaps, none of the definitions given are entirely free from metaphysical objections. More accurately speaking, perhaps, marriage may be defined to be a civil status existing between one man and one woman, legally united for life, for those civil and social purposes which are based upon the distinctions of sex. The parties enter into the contract of marriage, but when the contract is consummated by the conjugal union, all the rights, obligations and duties arising from the institution are regulated by law. Marriage is not a contract which receives its entire character, force and construction from the laws operating upon the parties at the time of its celebration. It is rather a continuing contract, and one whose duties and obligations, as well as the subsisting rights resulting from it, are as much ambulatory, almost, as a will. It is not only executory, but continuing, and subject to modification, from time to time, by the general legislation of the states, as to its rights and duties, and, therefore, not within the constitutional provision against laws impairing the obligation of contracts. (3 *American Law Reg. [N. S.]* 196, referring to *Dartmouth College v. Woodward*, 4 *Wheat. R.* 528.)

But the statutes of the state sometimes declare the rule upon the subject. Thus, by the laws of New York, it is enacted that "marriage, so far as its validity is concerned, shall continue in the state a civil contract, to which the consent of the parties, capable in law of contracting, shall be essential." (2 *R. S. part 2, ch. 8, tit. 1, § 1.* 2 *Stat. at Large*, 144. *Vide also Clayton v. Wardell*, 4 *N. Y. R.* 230.)

The marriage relation, when entered into, may be more accurately defined by the term "*status of marriage*" than by the phrase "contract of marriage;" nevertheless, this *status* is constituted by a contract, and the law allows the parties to regulate it in many important respects by an antenuptial agreement. So, after all, the institution of marriage may be regarded, as the law regards it, as exclusively a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts never having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience.

§ 622. What is necessary to constitute a complete and valid marriage, is a question which for a long time remained in a state of singular uncertainty, if it can be regarded as definitely settled at the present day. The question, whether the ceremonies and forms, or any of them, which are indicated by law or are customarily used for the solemnization of a marriage, are indispensable to the validity of the marriage, or not, has received much discussion in the courts, both in England and America, and the decisions have been far from unanimous on the subject. Sometimes it has been held that the marriage is not full and complete without both the civil and the religious ceremony, and at others that the mere consent of the parties is sufficient; although it has been doubted whether a single case can be found, in England or in this country, where the widow has been allowed her dower, or a child his inheritance, when the validity of the marriage rested on nothing but the consent of the parties. The matter is of sufficient interest to warrant a moment's examination to ascertain which way the authorities bear, if they do not substantially settle the question.

It is generally understood that, by the ancient common law of England, marriage being regarded as a sacrament, must, to be valid, have been celebrated *in facie ecclesiæ*. But since the Reformation, it has been regarded as a civil contract. That marriage might be validly contracted by mutual promises alone, or what were called *sponsalia de præsentî*, without the presence or benediction of a priest, was an established principle of civil and canon law antecedent to the council of Trent. (*Dalrymple v. Dalrymple*, 2 *Haggard's Consistory R.* 54.) Whether such a marriage was sufficient by the common law of England previous to the marriage act, has been disputed of late years in that kingdom. (*The Queen v. Millis*, 10 *Clark & Fin. R.* 534.)

§ 623. Previous to the marriage act, so called, of 26 George II, the legal validity of marriages depended upon the doctrines of the ecclesiastical courts. Some former statutes had inflicted penalties upon parties concerned in the celebration of clandestine marriages, but without venturing to control the rules which the church had established with reference to their validity. An opinion was commonly entertained that matrimony ordained, and regulated by the divine law, was not to be treated as a human institution, and was not a proper subject for the interference of the civil legislature. This opinion formed one of the principal grounds upon which the

new principle of nullity of marriage, introduced by the marriage act, was opposed.

That statute also effected another important alteration in the law of marriage by the clause enacting that no suit or proceeding should be had in any ecclesiastical court, to compel a celebration of marriage *in facie ecclesiæ*, by reason of any contract of matrimony, whether *per verba de præsentî* or *per verba de futuro*. Before the passing of this statute, the spiritual courts possessed the power of securing the performance of a contract of matrimony; and, as such was thus capable of being enforced, it had for some purposes the effect of marriage.

In later times the attention of the courts has seldom been called to the distinctions which previously prevailed upon this subject, and expressions have sometimes been used, which seem to imply an opinion that a matrimonial contract, unattended with any religious ceremony, was before the alteration of the law equivalent to a marriage legally solemnized. Matrimonial contracts or spousals were divided into contracts *per verba de futuro*, and contracts *per verba de præsentî*; and contracts of the former description, when followed by carnal intercourse, were commonly considered equivalent in legal effect to contracts *per verba de præsentî*. Contracts *per verba de futuro*, without consummation, might be released by mutual consent; and the spiritual courts had not the power of effectually enforcing them. But a present contract or a future contract *cum copula*, could be carried into effect by those courts. It would appear, however, that the doctrine was settled from a very early period, that, until the contract of marriage was sanctioned by a religious ceremony performed by a person in holy orders, it was incomplete; that it did not constitute lawful matrimony, and that it did not confer the civil rights incident to that state.

§ 624. At one period, it was held that a scrupulous observance of the prescribed forms in the solemnization of matrimony was essential to the validity of the marriage. In one case, the marriage was by a priest, but a ring was not used according to the book of common prayer. It was doubted whether this informality might not vitiate the marriage, and a case was ordered to be made upon the point; but the chief justice, Pemberton, inclined to think it a good marriage, there being words of contract *de præsentî* repeated after a parson in orders. (*Weld v. Chamberlayne*, 2 *Show. R.* 300.)

In another case, on a motion in arrest of judgment in an action by a woman for a breach of promise of marriage, Vaughan's opinion was against the plaintiff; and one of his reasons was, that a priest was requisite to the marriage, and that she ought, therefore, to have averred in the declaration, "*quod obtulit se*, in the presence of a parson." The other judges differed from Vaughan, not as to the necessity of the intervention of a priest, but as to the necessity of introducing such an allegation into the declaration. (*Holder v. Dickinson*, 1 *Freem. R.* 95.)

The judgment of Sir E. Simpson, in a case relative to the validity of a marriage celebrated abroad, which occurred shortly before the marriage act, illustrates the doctrine at that time adopted by the ecclesiastical courts. The marriage had been solemnized by a Roman Catholic priest according to the Roman ritual. The learned judge doubted whether even this species of marriage would be deemed perfect if it had taken place in England. He said that, "as a priest popishly ordained is allowed to be a legal presbyter, it is generally said that a marriage by a popish priest is good; and it is true, where it is celebrated after the English ritual, for he is allowed to be a priest; but upon what foundation a marriage after the popish ritual can be deemed a legal marriage is hard to say. Indeed, the canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnization according to English rites; and that contract or *ipsum matrimonium* does not convey a legal right to restitution of conjugal rights, though an English priest had intervened, if it were otherwise than according to the English ritual. Upon what reason or foundation then should a contract of marriage, entered into by the intervention of a popish priest, not in the form prescribed by law, be deemed a legal marriage in this country, more than any other contract that is considered by the canon law as *ipsum matrimonium*? * * * I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages." (*Scrimshire v. Scrimshire*, 2 *Hagg. R.* 395.) But, in a case which occurred before Lord Stowell in the year 1820, his lordship observed that it was a generally accredited opinion that, if a marriage was had by the ministration of a parson in the church who was ostensibly in holy orders, and was not known by the parties to be otherwise, such marriage should be supported; parties who come to be married were not expected

to ask for a sight of the minister's letters of orders; and, if they saw them, they could not be expected to inquire into their authenticity. (*Hawke v. Corri*, 2 *Hagg. R.* 280.)

§ 625. The statute formerly in force in England declared that if any person should knowingly and willfully marry in any other place than a church, or such public chapel wherein bans may be lawfully published, except by special license, or should knowingly and willfully intermarry without due publication of bans, or license from a person having authority to grant the same, or should knowingly and willfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriage of such persons should be null and void to all intents and purposes. (4 *Geo. IV*, *ch.* 76.) But by a later statute now in force, the intervention of a person in orders is not necessary, and valid marriages may be solemnized in a building duly registered, instead of a church, and with the certificate required by the act, instead of bans or license. (6 and 7 *William IV*, *ch.* 85.) However, if any parties shall knowingly and willfully marry, under the provisions of this latter act, in any other place than the church, chapel, registered building, or office, specified in the notice to be given under the act, or without due notice, or certificate, or license when necessary, or in the absence of a registrar or superintendent registrar, when required, the marriage is declared null and void. (6 and 7 *William IV*, *ch.* 85, § 39.)

In the great case recently decided in the house of lords on an appeal from Ireland, after a profound investigation of the question of marriage at the common law, the unanimous opinion of the twelve judges of England, first given, that a marriage of members of the Church of England, not solemnized according to the rites of the Church of England, was not a legal, valid marriage at common law to give the wife a *right of dower*, or for any purpose except to charge the parties civilly, was sustained by the most profound learning and discrimination in the opinions subsequently pronounced on the same side of the question by Lord Ch. Baron Abinger, Lord Chancellor Lyndhurst and Lord Cottenham.

In the very clear and logical opinion of Lord Cottenham, the following propositions were distinctly announced and proved: First, that a contract *per verba de præsenti* did not give to the woman the right of a wife in respect to dower; second, that such a contract did not give to the man the right of a husband in the

property of the woman; third, that such a contract between a man and a woman did not confer upon their issue the right of legitimacy; fourth, that a contract of marriage *per verba de præsenti* did not impose upon a woman the incapacities of coverture; fifth, that a contract of marriage *per verba de præsenti* did not make the marriage of one of the parties, while the other was living, with a third person void. Until a sentence of nullity was pronounced by the spiritual court, on the canonical ground of *pre contract*, said second marriage, in the face of the church, or by a person in holy orders, privately celebrated, was legal and valid to all intents and purposes whatever.

This view was concurred in by Lord Chancellor Lyndhurst and Lord Abinger; but, on the contrary, Lord Brougham, Lord Denman, Ch. J., and Lord Campbell, declared themselves in favor of the marriage, and each gave their opinions at great length. (*The Queen v. Millis*, 10 *Clark & Finelly's R.* 875.) So the question was not *definitely* settled whether a marriage *per verba de præsenti*—"by words of the present time," in the presence of witnesses only, is a valid marriage under the English laws; the better opinion, however, is adverse to such a marriage. (*Vide Catherwood v. Caslon*, 13 *Mees. & Wels. R.* 261.)

In a case decided in the high court of chancery, in 1840, it was held that where a marriage between a British subject domiciled in England, and a female ward of court, was celebrated in the presence of the British consul, and in the English church at Antwerp, by a clergyman of the Church of England, who had been appointed chaplain to the church, and was paid by the British government, it was invalid, because certain ceremonies prescribed by the law of Belgium had not been observed. (*Kent v. Burgess*, 11 *Sim. R.* 361. *S. C.* 34 *Eng. Ch. R.* 361.)

§ 626. On the continent of Europe, clandestine marriages, and marriages contracted by mutual promises alone, or what were called *sponsalia de præsenti*, without the presence or benediction of a priest, although they subjected the parties to the censures of the church, were not only held valid by the civil and the canon law, but were pronounced by the council of Trent to be "*vera matrimonia*." But a different rule was established for the future by that council, in their decree of the 11th of November, 1563. This decree makes null and void every marriage not celebrated before the parish or other priest, or by license of the ordinary, and

before two or three witnesses. But it was not within the power of an ecclesiastical decree, *proprio vigore*, to affect the *status* or civil relations of persons. This could only be effected by the supreme civil power. The church might punish by her censures those who disregarded her ordinances, but until the decree of council was adopted and confirmed by the civil power, the offspring of a clandestine marriage, which was ecclesiastically void, would be held as canonically legitimate. In France the decree of the council was not promulgated, but a more stringent system of law was established by the ordinance de Blois, and others which followed it. In Spain it was received and promulgated by Philip the Second in his European dominions. This is the understanding of Mr. Justice Grier, of the supreme court of the United States, as collected from the British Consistory Reports, where all the learning upon the subject is collected. (*Vide Hallett v. Collins*, 10 *Howard's U. S. R.* 174, 181. *Dalrymple v. Dalrymple*, 2 *Hag. R.* 54.)

In order to constitute a valid marriage in the Spanish colonies, all that was necessary was that there should be consent joined with the will to marry. The decree of the council of Trent requiring that marriage should be celebrated before the parish or other priest, or license of the ordinary, and before two or three witnesses, was never extended by the king of Spain to the colonies; and therefore the rule established by the parties above mentioned was permitted to remain unchanged. (*Hallett v. Collins*, *supra*.)

§ 627. Perhaps the question whether a marriage by consent or contract merely is valid in the United States, may be considered as yet unsettled. Chancellor Kent laid down the rule, that if the contract of marriage be made *per verba præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and that the marriage in such case is equally binding as if made *in facie ecclesiæ*; in a word, that there is no recognition of any ecclesiastical authority in forming the connection, and that marriage here is considered entirely in the light of a civil contract. (2 *Kent's Com.* 87.) And Chancellor Walworth, while he admitted that, by the ancient common law of England, a marriage was invalid unless it was celebrated *in facie ecclesiæ*, thought the law on the subject was unquestionably changed at the Reformation, if not before; and unqualifiedly asserted that "it is now a settled rule of the common law

which was brought into this state by its first English settlers, and which was probably the same among the ancient protestant Dutch inhabitants, that any mutual agreement between the parties to be husband and wife *in presenti*, especially when it is followed by cohabitation, constitutes a valid and binding marriage; if there is no legal disability on the part of either to contract matrimony." (*Rose v. Clark*, 8 *Paige's Ch. R.* 574, 580.) Chancellor Kent said: "The only doubt entertained by the common law was, whether cohabitation was also necessary to give validity to the contract. It is not necessary that a clergyman should be present to give validity to the marriage, though it is doubtless a very becoming practice, and suitable to the solemnity of the occasion. The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged." (2 *Kent's Com.* 87.)

The supreme court of the State of New York declared that the maxim of the civil law, *nuptias non concubitas sed consensus facit* (*Dig. Laws* 50, *tit.* 17, § 30), or one of the same import, has ever been regarded in courts of common law as a good definition of marriage; excepting to the expression in Wood's Institutes of the Laws of England, that "marriage or matrimony is an espousal *de presenti*, and a conjunction of man and woman in a constant society." (*Jackson v. Winne*, 7 *Wend. R.* 47, 50.)

But this question came up before the supreme court of the United States in 1850, on error from the circuit court in South Carolina, and the judges were equally divided upon it, and gave no opinion. Chief Justice Taney observed: "The question has, of course, no concern with the nature and character of the union of man and wife, in a religious point of view. But regarding it (as a court of justice must do) merely as a civil contract, and deciding in what form it ought to have been celebrated in order to give the parties the legal rights of property which belong to the husband or the wife, and to render the issue legitimate, the circuit court held, and so instructed the jury, that, if they believed that, before any sexual connection between the parties, they, in the presence of the family and friends, agreed to marry, and did afterward live together as man and wife, the tie was indissoluble even by mutual consent, and that if the contract be made *per verba de presenti* and remains without cohabitation, or if made *per verba de futuro* and be followed by consummation, it amounts to a valid

marriage, and which the parties (being competent as to age and consent) cannot dissolve; and that it is equally binding as if made in *facie ecclesiæ*. Upon the point thus decided, this court is equally divided; and no opinion can therefore be given." (*Jewell's Lessee v. Jewell*, 1 How. R. 219, 233, 234.) The late Surrogate Bradford laid down the rule, that "marriage in its origin is a contract of natural law, and in a civil society is a civic contract, requiring no form or ceremony unless imposed by the local law, and hence when the law directs the ceremony to be conducted in a prescribed manner, a failure to comply with such forms does not affect the validity of the contract unless such effect be expressly directed by statute." (*Ferrie v. The Public Administrator*, 3 Brad. R. 151, 169, 170.)

The late Chief Justice Parsons, in a case before the supreme judicial court of Massachusetts, observed: "Marriage being essential to the peace and harmony and to the virtues and improvements of civil society, it has been, in all well regulated governments, among the first attentions of the civil magistrate to regulate marriages, by defining the characters and relations of parties who may marry, so as to prevent a conflict of duties, and to preserve the purity of families; by describing the solemnities by which the contract shall be executed, so as to guard against fraud, surprise and seduction; by annexing civil rights to the parties and their issue, to encourage marriage, and to discountenance wanton and lascivious cohabitation, which, if not checked, is followed by prostration of morals and a dissolution of manners; and by declaring the causes and the judicature for rescinding the contract, when the conduct of either party and the interests of the state authorize a dissolution. A marriage contracted by parties authorized by law to contract, and solemnized in the manner prescribed by law, is a lawful marriage; and to no other marriages are incident the rights and privileges secured to husband and wife and to the issue of the marriage." (*Milford v. Worcester*, 7 Mass. R. 48, 52, 53.)

§ 628. An article has been lately prepared in the office of the attorney-general of the United States, for the use of one of the foreign ministers, and published in the American Law Register, discussing at great length the laws regulating the forms of marriage in the United States; and it is thought that no better service can be rendered the profession than by giving the substance of some of the statements contained in this article.

It is affirmed that marriage in the United States is not a federal question, but one over which the states and territories have control, under civil regulations immemorially understood, or through special legislation. The solemnization of this civil contract was a cardinal idea with primitive colonists along the entire coast-country of America, and, according to the respective creeds of each body of settlers, regular ministers and priests were chosen to remain permanently in the exercise of their holy office. The earliest traditions and records alike prove that such ministers and priests claimed the marriage ceremony as a peculiar right. An act of parliament, passed in the time of the commonwealth, on the 16th of August, 1653, authorized justices of the peace to marry. And this additional form, adopted in the English West India islands and the colonies, under the common law, as well calculated to enforce decorum and order, has continued from the first settlement to the present time in many of the states and territories. With a fixed religious idea, making some church ceremony preferable, public sentiment was modified under the influence of this act; but there has been no period of time in this country when loose admissions of parties, excluding all special form, could have reduced the rule of marriage to the low standard of the Scotch law.

It has not been long since the supreme court of the United States was equally divided on a question of marriage law, arising under the laws of South Carolina and Georgia, and no opinion could consequently be given in regard to the necessity of a ceremonial as essential to a valid marriage. Bishop, a recent text writer on marriage law, has misstated the law of Maryland, though his view had the advantage of a very recent dictum of Mr. Justice Giles, in the United States district court of that state. It had been previously maintained in Maryland, by Chancellor Bland, that no marriage could be legal there without the intervention of a religious form, or the blessing of some clergyman. The Maryland case is about to be brought before the supreme court of the United States on appeal, and this high tribunal may thus decide what constitutes marriage.

There is no state or territory in the United States without some form of marriage legislation, either statutory or under established usage; and it has been shown that casual assemblages are far removed from the religious associations incorporated by law. The churches into which the Christian world had been subdivided at the

period of the settlement had full rights according to their respective creeds, and nothing better attests the reverence for this sacred obligation, under the marriage contract, than the unequivocal sentiment of disgust pervading all sorts of people everywhere at the attempted introduction of polygamy into Utah, a remote wilderness, to which the Mormons had been forced solely on account of this obnoxious doctrine, in defiance of morals, and against common law.

There has been a growing sentiment that a mere agreement between parties, properly witnessed, would make a valid marriage. It is a vexed question in many states of the union, needing further adjudication; and yet marriage in the colonies of America was always celebrated by a clergyman, or before a magistrate. This question, settled in England, has been decided one way for Scotland, and just contrariwise for Ireland. How far the intervention of some special form for solemnizing it is essential remains an open question in Maine. In South Carolina the supreme court has intimated the opinion that the statutory forms must be strictly followed. Marriage in Maryland is regulated by the act of the general assembly of 1777, recently made an article of the new Maryland Code. In this state some *form*, Christian or Jewish, or the blessing of some accredited minister, is absolutely required. What constitutes marriage, *in itself*, is altogether different from the mere proof and evidence of a marriage. It may be inferred from various circumstances, without weakening the argument in favor of *needful* legal forms in the face of some church, or before some judicial tribunal in the United States. In the states and territorial governments, the religious form of marriage is the general rule, being imperative in some of the states; and, save the State of New York, there is no state or territory in which some special form has not been prescribed.

In England, and in every state of the United States, the greatest indulgence has been conceded to the Friends, called Quakers. Their mode maintains, in its integrity, the order of marriage, and secures its due authentication. Clandestineness is altogether excluded. The marriage must be in the face of a congregation, duly assembled, and the mutual promise of the man and woman is attested by those present. Marriage in the Roman Catholic Church, since the twenty-fourth session of the council of Trent, has been regarded as a sacrament, and the Friends, called Quakers,

as if in emulation, while denying the efficacy of all forms, have been at special pains to hedge the marriage ceremony in the strictest manner. Their example has not been without its salutary effect, in this behalf, with other denominations of Christians. Marriage is not a civil contract disjoined at the option of parties from all religious forms. (3 *Am. Law Reg.* [N. S.] 129-144.)

§ 629. The legislation, as well as the judicial decisions, of the different states upon the subject of marriage, present many of the most interesting and difficult questions in the law, as that vital domestic relation may be said to lay at the very foundation of civil society. Nothing which touches either its formation or dissolution can be unimportant in any well governed commonwealth, and, therefore, the question has been much and learnedly discussed. The rule laid down in New York, and especially the position assumed by Chancellor Kent, that "the consent of the parties may be declared before a *magistrate*, or *simply before witnesses*, or *subsequently confessed or acknowledged*, or the marriage may even be inferred from continual cohabitation and reputation as husband and wife, except in civil actions for adultery, or in public prosecutions for bigamy or adultery, when actual proof of the marriage is required," has been the subject of considerable criticism and learned examination. Mr. Lockwood, in one of his able and copious notes to the text of Bright's treatise on the law of husband and wife, examines the position of Chancellor Kent, and says: "From that part of the foregoing extract in *italics* we take leave to dissent, without qualification or reason, so far as the law of our state is concerned. What is meant by '*actual proof* of the marriage,' in the closing line, is not very clearly expressed. It probably means 'proof of an actual marriage,' as that is what the law requires in the cases mentioned in the text. In support of this doctrine that such a marriage before witnesses *in verba de presenti*, or a confession or acknowledgment, would *ipso facto* make a legal, valid marriage, the chancellor cites several English cases, worthy of being examined, as also a multitude of *Scotch* cases, which we do most heartily abhor and repudiate. The cases cited from Dow's Parliamentary Cases are Scotch appeals to the house of lords, and only decide what is the law of marriage in Scotland. Heaven forbid that we should resort to that *officini nuptiarum raptorum* to ascertain the law of marriage in New York! But some of the English cases cited are full of illustrations of the very

opposite doctrine to that which the chancellor has laid down of a marriage by calling in a witness to the *sponsalia*, or a subsequent confession or acknowledgment." And after examining critically, and at considerable length, a large number of the English and some of the American cases involving the question, and referring briefly to the authorities as to the validity of marriages contracted without the legal prerequisites in those states of the Union where clergymen, judges and justices of the peace have the power of marrying by statute, and finding those decisions somewhat contradictory, Mr. Lockwood concludes: "The weight of authority seems to preponderate in favor of such validity, if the *number of cases* be the test. But whether they are sufficient to turn the scale, if strict legal principles be made the touchstone, will probably remain a vexed question, in many states of the Union, until further discussions and adjudications have taken place upon the subject." (1 *Bright's Hus. and Wife*, 10, note 1.) This note of Mr. Lockwood's was written in 1850, since which time several new authorities have appeared upon the subject, and yet the question is as much unsettled now, perhaps, as it was then.

§ 630. In the year 1851 a very important case came before the late lamented Surrogate Bradford, of the city of New York, involving the validity of a marriage contract, and he gave the subject a very careful, critical and elaborate examination. Among other things, he observed: "Whether, previous to the English marriage act of 1754, a contract of marriage *per verba de presenti* constituted a legal marriage at common law, or whether a religious ceremony or public solemnization was essential to its validity, is a question of great interest. Mr. Roper, in the *addenda* to his treatise on husband and wife, discussed the point very elaborately, and arrived at the conclusion that, 'according to the law administered in England before the marriage act, a matrimonial contract, *de presenti*, was essentially distinct from a marriage solemnized by a person in holy orders; that it did not confer on the woman the right to dower, or the man the right to the woman's property, or on the issue the rights of legitimacy; and that it did not render a subsequent marriage with a third person *ipso facto* void at law, though it formed a ground for a sentence annulling it.' (*Roper on Hus. and Wife*, p. 474.) In *Dumaresly v. Fishly* (3 *Marshall's R.* 368), the same view was taken of the effect of a mere contract by present words, in the able opinion of Justice Mills, who contended that

such a marriage was not sufficient to confer upon the parties the usual rights of property. The majority of the court, however, ruled the other way. * * * This subject came before the supreme court of this state at an early period. * * * But there is not a solitary case in our books where the marriage was held to be valid unless there was either cohabitation or solemnization before a magistrate or minister. I have not met with a decision establishing a marriage or proof of a private contract, unconnected with either previous or subsequent cohabitation. It is not to be denied, however, that the courts, in pronouncing judgment, have incidentally recognized the doctrine that no formal solemnization of marriage is requisite by the common law; that a marriage *per verba de præsenti* was as valid as if made *in facie ecclesiæ*, and that a full, free and mutual consent between parties capable of contracting is sufficient to constitute marriage, though not followed by cohabitation. These opinions were based upon the supposed rule of the common law, in this respect conceived to be coincident with the canon law that, as stated by Poynter, 'a contract *per verba de præsenti*, that is to say, between parties entering into a present agreement to become husband and wife, or a promise *per verba de futuro*, which was an agreement to become husband and wife at some future time, if the promise were followed by consummation, constituted marriage without the intervention of a priest, for the contract *per verba de præsenti* was held to be a marriage complete in substance, but deficient in ceremony; and though the promise *per verba de futuro*, of itself, was incomplete in both points, yet the cohabitation of the parties, after exchanging the mutual promise, implied such a present consent at the time of the sexual intercourse as to complete the marriage in substance, and give it equal validity with the contract *de præsenti*.' (*Poynter on Marriage and Divorce*, p. 15.) If this proposition be true it may well be the subject of anxiety and apprehension that a contract of such infinite consequence to the order and well-being of society, and the security of the rights of property, has been left, in regard to the evidences of its existence, in so loose and uncertain condition. The policy ought seriously to be considered of permitting the formation of an indissoluble contract of the most sacred character, the certainty of which lies at the very foundations of social peace and virtue, without requiring such a formal solemnization as may secure the unequivocal demonstration of the

marriage. The statutes of frauds and of wills regulate contracts and transactions of much inferior moment by requiring certain acts to be performed or signified in a certain mode, and established by certain evidences; and yet the matrimonial contract is left, as regards the proof of its formation or existence, in this most dangerous condition." (*Jaques v. The Public Administrator*, 1 *Brad. R.* 499, 506-509.)

§ 631. Mr. Bishop says: "There was a time when the Anglo-Saxon race, though rude and uncultivated in modern chicanery, never inflicted the disgrace of concubinage on a woman who lived with one man, and one man only, as his wife, and bore him children, unless the man was of too near affinity or consanguinity to her, or unless he had another wife to whom he was earlier married. But in these days of modern refinement, many an Anglo-Saxon woman learns, or her offspring after she is dead learns, that some slip in the form of marriage has made her a sort of select strumpet, and has made her children bastards. Men who like to deceive honest women, and men who value riches in a wife, or a settlement, more than they value true marriage, admire this; and they consider the Scotch people, who do not like it, and the people of some of our states, who also do not like it, to be, by reason of their want of love for the refinement, almost barbarians. May barbarism, if this is such, long prevail in the United States." (1 *Bishop on Marriage and Divorce*, § 20.)

But the principles of the common law respecting marriage are few and simple. It requires no ceremony, no solemnization by minister, priest, or magistrate. A marriage is complete where there is a full, free and mutual consent by the parties capable of contracting, even when not followed by cohabitation. Such was the simplicity of the law throughout christendom on the subject of marriage, that before the time of Pope Innocent III, who died in 1216, there never had been any solemnization of marriage; but the man went to the house inhabited by the woman, and led her away to his own house. This was the only ceremony then used. At least this is the statement of Justice Clerke of the New York supreme court, made in a case decided in 1857, and there is no doubt but history, and the principles of the New York decisions, justify the position. (*Canjolle v. Ferrie*, 26 *Barbour's R.* 177, 184, 185. *Same Case*, 23 *N. Y. R.* 90.)

It may be stated, that by a recent act of the national legislature, it is enacted that "all marriages in the presence of any consular officer in a foreign country, between persons who would be authorized to marry if residing in the District of Columbia, shall have the same force and effect, and shall be valid to all intents and purposes as if the said marriage had been solemnized within the United States." (*Laws of Congress of 1860, ch. 179, § 31.*)

§ 632. Among the savage tribes of North American Indians, marriage is merely a natural contract, and neither law, custom nor religion has affixed any conditions, limitations or forms other than those which nature herself has prescribed. Permanency is not to be regarded as an essential element of marriage by the law of nature; otherwise all such connections as have taken place among the various tribes of the North American Indians, either between persons of pure Indian blood, or between half breeds, or between the white and Indian races, must be regarded as illicit and the offspring illegitimate; for it is well established that in most of the tribes, perhaps in all, the understanding of the parties is that the husband may dissolve the contract at his pleasure. The power of divorce in one or both of the parties to a contract of marriage at his or her pleasure, is not inconsistent with the law of nature. But a mere casual commerce between the sexes does not constitute a marriage by the law of nature; but when there is a cohabitation by consent, for an indefinite period of time for the procreation and bringing up of children, that, in a state of nature, would be a marriage. (*Johnson v. Johnson, 30 Mo. R. 72.*)

CHAPTER XXXIX.

THE PARTIES TO A MARRIAGE—PARTIES MUST BE ABLE TO CONTRACT
—IMPEDIMENTS TO MARRIAGE—WANT OF AGE—WANT OF MENTAL
CAPACITY—IMPOTENCE—CONSANGUINITY AND AFFINITY—RACE AND
COLOR AND CIVIL CONDITION—PRIOR MARRIAGE.

§ 633. TAKING marriage in the civil light indicated in the last chapter, the law treats it as it does all other contracts, allowing it to be good and valid in all cases where the parties, at the time of making it, were, in the first place, *able* to contract; secondly,

willing to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

The parties must be *able* to contract. In general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities and incapacities. There are, however, several disabilities and incapacities which disqualify the parties from entering into a valid contract of marriage, and these will be noted in their order.

1. Want of the requisite age to consent to the marriage disqualifies the person from entering into the marriage relation. What is the age of consent, and under what circumstances infants may contract marriage, has been fully discussed in another place, and, of course, the discussion need not be repeated here. (*Ante*, §§ 81-86.)

2. Want of mental capacity is an impediment to marriage. It has been said that the marriage of an idiot or lunatic was valid by the common law (*Hamaker v. Hamaker*, 18 *Ill. R.* 137; *Park v. Barron*, 20 *Geo. R.* 702); but Lord Stowell thinks the conclusion is "founded on some notion that prevailed in the dark ages of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character." (*Turner v. Meyers*, 1 *Hag. Con. R.* 414.) And Sir William Blackstone, very pertinently remarks: "A strange determination, since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to any thing. And therefore the civil law judged much more sensibly when it made such deprivation of reason a previous impediment. And modern resolutions have adhered to the reason of the civil law by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void." (2 *Black. Com.* 438, 439.) And it is now well settled, both in this country and in England, that an idiot cannot marry, because incapable of entering into any contract; and, for the same reason, lunatics are incapable of marrying, except during lucid intervals; and their marriages, as well as those of idiots, are absolutely void. It makes no difference what the defect of reason is; it is enough that the mind is so deranged as to be unable to deal with the common affairs of life, although a mere *weakness* of mind, not amounting to derangement, will not disqualify the person from entering into a valid marriage. (*Turner v. Meyers*, 1 *Hag. Con. R.* 414. *Browning v. Reane*, 2 *Phillim. R.* 69. *Ex parte*

Twining, 1 *Ves. & Bea. R.* 140. *Crump v. Morgan*, 3 *Ired. Eq. R.* 91, 96. *Foster v. Means*, 1 *Spears' Eq. R.* 559, 574. *Ball v. Mannin*, 3 *Bligh's [N. S.] R.* 1, 21. *Baxter v. Portsmouth*, 1 *Eng. Com. Law R.* 190. *Ex parte Barnsley*, 3 *Atk. R.* 168, 171.)

The subject of insanity is a fruitful one, and of course it would not be appropriate here to enter upon any extended discussion of the theme. As applied to marriage, the test of insanity is the same as in other contracts. If the incapacity be such that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her own person and property by the matrimonial contract any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract, though it may not be difficult, in most cases, to decide upon the result of the circumstances. (*Browning v. Reane, supra.*) Madness may subsist in various degrees; sometimes slight, as partaking rather of disposition or humor, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. (*Turner v. Meyers, supra.*)

It has been held in some cases that there may be so much imbecility as to render the party incapable of making contracts which will bind his estate, and yet not incapacitate the party from contracting marriage. (*Ex parte Glen*, 4 *Dessau. R.* 546.) But this would seem to be an erroneous view of the subject entirely. It is but reasonable to suppose that these unhappy persons who are prohibited by law from making any binding contract for the merest trifle, should be protected from the effects of a covenant of so high a nature as that of marriage, which never could be entered into by the party without some base or sinister design. Certainly no other contract requires more *brain-quantity*, or *brain-quality*, than that which in effect is to dispose of the person and the property of the individual for life; and it is the duty of the law to protect those unhappy beings who are incapacitated by reason of mental weakness or derangement, to enter into an ordinary contract respecting their property, from the artifice of desperate persons who might be willing to speculate on their misfortunes. (*Vide Anonymous*, 4

Pick. R. 32. *Middleborough v. Rochester*, 12 *Mass. R.* 363. *Cole v. Cole*, 5 *Sneed's R.* 57. *Atkinson v. Medford*, 46 *Maine R.* 510.)

What degree of mental imbecility, what extent of intellectual aberration will suffice to annul a contract of marriage, it is difficult to pronounce; certainly mere weakness of intellect, or even great eccentricity of conduct, unless it reaches a point that evinces inability to comprehend the subject-matter of the contract, will not suffice; and every principle of sound policy and humanity admonishes us that a contract so important in its social relations, and bearing so materially on the peace and happiness of families, should not be set aside upon slight grounds, or on less proof than would suffice to annul contracts less sacred and important in their nature. No other test, therefore, in cases of marriage, can be resorted to, except that the mental unsoundness which will disqualify persons from entering into other contracts disqualifies them from entering into matrimony. (*Ward v. Dulaney*, 23 *Miss. R.* 410.) It has frequently been attempted to furnish some general rules which might serve as guides to courts of law in the investigation and decision of cases of this description, but all endeavors to do so seem to have failed; every case has some distinguishing features, and each case must, therefore, be governed by its own peculiar circumstances. (*Medway v. Croft*, 3 *Curteis' Ec. R.* 671, 675. *And vide McElroy's case*, 6 *Watts & Serg. R.* 451.)

§ 634. Drunkenness, of itself merely, unless fraud be practiced, will not avoid a contract of marriage; but if the party be in such a state of intoxication that he is for the time deprived of reason, he cannot be said to have an agreeing mind, and matrimony contracted in such a state can be avoided. (*Clement v. Mattison*, 3 *Rich. R.* 93. *Legeyt v. O'Brien*, *Milward's R.* 325. *Menkins v. Lightner*, 18 *Ill. R.* 282. *Gore v. Gibson*, 13 *Mees. & Wels. R.* 623. *Shaw v. Thackary*, 23 *Eng. L. & Eq. R.* 18.)

The rule of law in criminal cases is, that a man is liable for a criminal act committed during a fit of drunkenness brought on by his own wrongful indulgence; unless the crime were committed under the influence of insanity which is habitual or fixed, though caused by frequent intoxication, and originally contracted by his own acts. The law discriminates between the delirium of intoxication and the insanity which it sometimes produces. While the drunkenness continues, the person under its influence is responsible as a moral agent, though reason in the mean time has left her

dominion, and he is held for his criminal act under such circumstances, upon the principle that his drinking to excess is a criminal assent. But this doctrine does not obtain in civil jurisprudence; and any obligation entered into by a person when deprived of the exercise of his understanding by intoxication, is voidable by himself, though the intoxication was voluntary and not procured through the circumvention of the other party. (*Barrett v. Buxton*, 2 *Aikin's* [Vt.] *R.* 167. *Hutchinson v. Tindall*, 2 *Green's Ch. R.* 357. *Johnston v. Brown*, 2 *Scotch Sess. Cas.* [new ed.] 437. *Browning v. Reane*, 2 *Phillim. R.* 69.)

It would hardly seem possible that any decent person would be willing to stand up and be joined in matrimony with another known to be beastly drunk, and yet such instances have occurred, especially when there has been a great disparity in the pecuniary circumstances and social condition of the parties.

Deaf mutes may contract matrimony, and the engagement may be solemnized by signs. (*Dickenson v. Blisset*, 1 *Dickens' R.* 268. *Brown v. Fisher*, 4 *Johns. Ch. R.* 441. *Harrod v. Harrod*, 1 *Kay & Johns. R.* 4. *Elyot's case*, *Cart. R.* 53.) Formerly these afflicted persons were regarded as idiots, especially when they were deaf and dumb from their nativity; but many of them have often displayed great intelligence and capabilities for intellectual and moral cultivation; and now they are permitted to enter into marriage and other engagements, except upon proof of their mental capacity it is found wanting in the same degree as would disqualify other persons from making a valid contract. Of course it is no objection to a matrimonial alliance that the parties are blind.

§ 635. By a statute passed in England in 1742, and still in force there, it is provided that the marriage of lunatics and persons under frenzies (if found lunatics under a commission, or committed to the care of trustees by an act of parliament), before they are declared of sound mind by the lord chancellor, or the majority of such trustees, shall be void. (15 *George II*, *ch.* 30.) And by another act the provisions of the former are extended to Ireland. (51 *George III*, *ch.* 37.) These statutes render the marriages in question null and void, although they may have been contracted during lucid intervals. But if no commission of lunacy has issued, the marriage of a lunatic during a lucid interval is good. (*Turner v. Meyers*, 1 *Hag. Con. R.* 414. *Wheeler v. Alderson*, 3 *Hag. Ec. R.* 574, 599. *Cartwright v. Cartwright*, 1 *Phillim. R.* 90.

Borlase v. Borlase, 4 *Notes Cases* 108. *Grimani v. Draper*, 12 *Jur.* 925.) It is not understood that the statute of George II is a part of the common law of the American States ; and in general in this country, if it appears that both parties to a marriage were sane, and possessed of the requisite mental capacity, at the time the nuptials were celebrated, the marriage will be sustained, though one of the parties may have been insane before or subsequent to the marriage ; at the same time, if it appears that a party to a marriage who is habitually of sane mind, was temporarily insane at the time the marriage was celebrated, the marriage may be avoided. (*Legeyt v. O'Brien*, *Milward's R.* 325. *Parker v. Parker*, 2 *Lee's R.* 382. *S. C. 6 Eng. Ec. R.* 165.)

It is generally laid down that marriage with an idiot or lunatic is absolutely void, and that no sentence or decree of avoidance is necessary, and this is the rule at common law ; but the statutes of some of the states render such marriages absolutely void only from the time their nullity is declared by a court of competent authority. Thus, in the State of New York, where either party to a marriage shall be incapable of contracting to it, the marriage will be void from the time its nullity shall be declared by a court of equity. (2 *Revised Statutes*, part, 2 *ch.* 8, *tit.* 1, § 4. 2 *Statutes at Large*, 144.)

In the State of Massachusetts, it is enacted by statute that the validity of a marriage shall not be questioned in the trial of a collateral issue on account of the insanity or idiocy of either party, but only in a process duly instituted in the life-time of both parties for determining such validity. (*Gen. Stat. ch.* 107, § 2.)

In Wisconsin, the statute provides that when either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from the time its nullity shall be declared by a court of competent authority. (*Rev. Stat. ch.* 79, § 2.)

Others of the states have similar enactments in imitation more especially of the State of New York. And for the sake of the good order of society, and the peace of mind of all persons concerned, and to save all question as to the real capacity of the party at the time the marriage was entered into, it is deemed expedient and best in all cases that the nullity of the marriage should be ascertained and declared by the decree of a court of competent

jurisdiction. Morality and policy require that it should not be left unknown or uncertain, either to the parties or to others, whether the relation of husband and wife actually exists or not. (*Ferlat v. Gogin*, *Hopkin's Ch. R.* 478, 484. *Hayes v. Watts*, 3 *Phillimore's R.* 44. *Petreis v. Tondear*, 1 *Hag. Con. R.* 138. *Crump v. Morgan*, 3 *Ired. Eq. R.* 91.)

In the State of New York, children of a marriage annulled on the ground of lunacy or idiocy, are entitled to succeed in the same manner as legitimate children to the real and personal estate of the parent who was of sound mind, and the marriage of the lunatic may be declared void upon the application of the lunatic, after the restoration of reason; but in such case, no sentence of nullity will be pronounced if it shall appear that the parties freely cohabited as husband and wife after the lunatic was restored to a sound mind. When a marriage is sought to be annulled on the ground of the idiocy of one of the parties, it may be declared void on the application of any relation of the idiot, interested to avoid the marriage, at any time during the life-time of either of the parties; when it is sought to be annulled on the ground of the lunacy of one of the parties, it may be declared void at any time, during the continuance of the lunacy, or after the death of the lunatic in that state, during the life-time of the other party to the marriage, on the application of any relative of the lunatic interested to avoid the marriage; and when the marriage of an idiot or lunatic is sought to be annulled, during the life-time of both the parties to the marriage, and no suit shall be prosecuted by any near relative, a sentence of nullity may be pronounced, on the application of any person admitted by the court to prosecute as the next friend of such idiot or lunatic. (2 *Rev. Stat. part 2, ch. 8, tit. 1, §§ 24, 25, 26, 27, 28.* 2 *Stat. at Large*, 148, 149.) In other states similar provisions in the statute may be found.

§ 636. A third impediment to marriage is the impotence of one or both of the parties. This is defined to "consist in the incapacity for copulation, or in the impossibility of accomplishing the act of procreation" (*Shelford's Marriage and Divorce*, 202); or, the "incapacity of either spouse for the act of copulation; or, as some think, the want of power to procreate children." (1 *Fraser's Dom. Rel.* 53.) Or, impotence may be said to be the permanent inability, from malformation, accident or disease, for copulation or procreation.

It has been said, that the first cause and reason of matrimony ought to be the design of having an offspring; and that the second ought to be the avoiding of fornication. (*Ayl. Parer.* 360.) And it is perfectly legitimate for parties to have in view, when they enter the married state, a lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence. (*Dean v. Aveling*, 1 *Robertson's R.* 279, 298. *Briggs v. Morgan*, 3 *Phillim. R.* 325.) The propositions laid down in the marriage service of the English church embody the common sense of the matter, wherein they state that marriage is ordained for three purposes: the procreation and education of children; the avoidance of incontinence; and the mutual society, help and comfort of the married pair. Any union where provision is not made for fulfilling all of these purposes, may be proved contrary to natural law, using that word in its widest sense. No person should ever offer himself in marriage unless he has the ability of consummating it; and when an impotent person palms himself upon a female not cognizant of his condition, he perpetrates a most grievous wrong. It is interesting to note the points that have been made in the discussion of this question of impotency, and the different views which have been expressed by text-writers and judges upon the subject, and as to what is sufficient to forbid marriage. Mr. Fraser says: "The ninety-eighth constitution of Leo, the philosopher, expresses at great length the utter abhorrence of the emperor at the doctrine, that the *potentia copulandi*, without the power of procreating children, was sufficient. The most eminent commentators on the canon law are of the same opinion. Bower argues the point with great warmth, holding, as his leading principle, that marriage is not instituted for the satisfying of lust, or the exciting of passion, but for the begetting of children. (*Brown*, 2, 4, 10.) In a late criminal case, as to whether *emissio* was necessary to constitute the crime of rape, Lord Medwyn is reported to have said, that he held the *potentia copulandi*, without the *potentia seminandi*, to form a good defense to an action of nullity on the head of impotency. (*Lord Advocate v. Robertson*, 12 *Mar.* 1836.) This must, however, be a misreport, as the opinion is based on that of Sanchez, which is entirely opposite; for that learned canonist holds it to be impotency if a woman was *ita arcta ut mater esse non potest*. (*Sanchez*, 7, 92, *Nos.* 7, 8, 11, and 2, 21, 5, and 7, 96, 7.) A quotation is professed to be

made in the report from Sanchez; but there is no reference given, and the words quoted seem to be those employed by Sanchez to designate the views of authors that he condemns." (1 *Fraser's Dom. Rel.* 53-55.)

In a case before Dr. Lushington sitting in the consistory court of London in 1845, the judge observed: "Mere incapability of conception is not sufficient ground whereon to found a decree of nullity, and alone so clearly insufficient that it would be a waste of time to discuss an admitted point. The only question is, whether the lady is or is not capable of sexual intercourse; or, if at present incapable, whether that incapacity can be removed." (*Dean v. Aveling*, 1 *Robertson's R.* 279.) Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; and yet it cannot be said that every degree of perfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, it would probably be regarded as no intercourse at all. It can hardly be said that the true interests of society would be advanced by taking within the marriage bonds parties driven to such disgusting practices. Certainly it would not tend to the prevention of illicit intercourse, one of the greatest evils to be avoided. And Dr. Lushington said with respect to the case before him: "If there be a reasonable probability, that the lady can be made capable of *vera copula*, of the natural sort of *coitus*, though without the power of conception, I cannot pronounce this marriage void. I will briefly state the reasons. In the case first supposed, the husband must submit to the misfortune of a barren wife, as much when the cause is visible and capable of being ascertained, as when it rests in undiscoverable and unascertained causes. There is no justifiable motive for intercourse with other women in the one case more than in the other. But when the *coitus* itself is absolutely imperfect, and I must call it unnatural, there is not a natural indulgence of natural desire; and almost of necessity disgust is generated, and the probable consequences of other connections, with men of ordinary self-control, become almost certain. I am of opinion, that no man ought to be reduced to this state of *quasi* unnatural connection, and consequent temptation; and therefore I should hold the marriage void. The condition of the lady is greatly to be pitied, but on no principle of justice can her calamity be thrown upon another." (*Dean v. Aveling*, 1 *Robertson's R.* 279, 299.)

Although this was a case for a divorce before Dr. Lushington, the principles enunciated by him apply as well to parties proposing to enter the marriage relation as to that. Of course it cannot honestly be known for a certainty before marriage that the female may not prove to be a barren or sterile wife, but it is ordinarily known to the parties, when they propose the matrimonial alliance, whether there is natural malformation of the sexual organs to render the natural *coitus* impossible, and if such be the fact they should understand that it is a natural impediment to marriage. It is wholly immaterial as to the origin of the impotence, whether connate or the result of accident or disease, if it exist at the time of the proposed marriage. Upon this subject the Archbishop of Canterbury, in a case before the twelve commissioners to be decided, of which he was one, said: "There are three sorts of eunuchs, or men unfit to marry; the one is of God's making, the second is of man's making, and the third is of their own making. The first are they that are past from their mother's belly, who either are *frigidi* or such as have no members fit for generation, or some apparent debility. The second are those who are castrated by men, or by some violence have that hindered in them, whereunto, by nature, they are fit in respect of procreation. The third hath no coherence with this nobleman." (*Essex v. Essex*, 2 *Howell's State Trials*, 786, 887.)

§ 637. With respect to the female, Chancellor Walworth well said in a case before him: "Impotence on the part of the female, which cannot be cured by proper medical treatment or a surgical operation, is a case of very rare occurrence. And the cases of this kind which will be likely to come up before this court for adjudication, on the complaint of the husband, will be limited to cases of impervious vagina, from an original malformation, or the effect of some supervening infirmity or disease, as mere sterility can in no case form a sufficient ground for a decree of nullity." (*Devanbagh v. Devanbagh*, 5 *Paige's Ch. R.* 554, 557.)

Dr. Beck, in his "Elements of Medical Jurisprudence," says: "From a review of the causes of impotence in both sexes, it is evident that the absolute ones are few in number, in that they are mostly palpable to the senses, and that the number formerly assigned to this class has been greatly reduced by the improvements in surgery." (1 *Beck's Med. Jur.* 89.)

When the parties have the least reason to suspect that they are *impotent* they should never venture upon marriage until they have been thoroughly tested by surgical examination and treatment. However unpleasant and mortifying such an examination may be, far better that it be submitted to than run the hazard of not being able to consummate their nuptials, and being under the necessity of submitting to the disgrace of a separation.

Of course, simple *sterility* is no legal impediment to marriage; if it was, no female beyond the ordinary time of child-bearing could enter the marriage state. When a man knowingly marries a woman past the age of child-bearing, he has no cause to complain of the barrenness of the connection, and no unpleasant effects are likely to result from the union. But in case of the *impotence* of either of the parties, none of the peculiar ends of matrimony can be accomplished by marriage, and a union should be discarded as much as the marriage of two persons of the same sex.

In the State of New York, a suit to annul a marriage on the ground of the physical incapacity of one of the parties, can only be maintained by the injured party against the party whose incapacity is alleged, and must in all cases be brought within two years from the solemnization of the marriage. (2 *Rev. Stat. part 2, ch. 8, tit. 1* § 33. 2 *Stat. at Large*, 149.) And in all these cases the court should proceed with the greatest diligence and care, not only to avoid collusion by the parties, but also to guard against an honest mistake under which they may be acting, merely from the want of proper medical advice and assistance. (*Davenbagh v. Davenbagh*, 5 *Paige's Ch. R.*, 554. *E. B. v. E. C. B.* 28 *Barb. R.* 299.)

Ordinarily, impotency is a matter which cannot be proved by witnesses. The nature of the fact precludes it, and therefore it has been held that the courts have the power to compel the party alleged to be impotent to submit to a medical examination, for the purpose of ascertaining how the fact is. Such an examination, to be sure, is offensive to natural modesty, but if the court should hesitate to exercise the power to compel it, it would in most cases amount to an absolute denial of justice, and the court must not sacrifice justice to notions of delicacy of its own. (*Newell v. Newell*, 9 *Paige's Ch. R.* 25. *Davenbagh v. Davenbagh*, *supra*. *LeBaron v. LeBaron*, *Am. Law Reg. [N. S.]* 212. *Norton v. Seton*, 1 *Eng. Ecc. R.* 384. *Briggs v. Morgan*, *Ib.* 408.)

§ 638. A fourth impediment to marriage is the consanguinity or affinity of the parties. Consanguinity and affinity differ widely in their nature, and yet by the law little or no distinction is made between them. They may, therefore, be treated together as an impediment to marriage.

In all countries where the canon law has had authority or influence, marriage between near relatives by blood or affinity is prohibited. Similar prohibitions were contained in the Jewish laws; and, indeed, the test of the Levitical degrees adopted in most countries had its origin in the Mosaic Code. The same prohibitions also existed in the laws and usages of the Greeks and the Romans, and they may be said to be founded in the law of nature; and a marriage within the Levitical degrees is regarded in all Christian communities as a nuisance extremely offensive to the laws and manners of society, and tending to endless confusion, and the pollution of the sanctity of private life. (*Burgess v. Burgess*, 1 *Hag. Con. R.* 386. *Woods v. Woods*, 2 *Curt. R.* 516. 2 *Kent's Com.* 82.)

It is very difficult to ascertain the exact point at which the law of nature would discountenance the union, and hence the matter is generally regulated by statute. Usually the Levitical degrees are adopted as the test of prohibition, and marriages within those degrees, under some exceptions, are made void by statute.

In 1563, Archbishop Parker published a table of prohibited degrees, which has ever since been regarded the basis of judicial opinion on the subject in England, and of legislative enactments in the United States. With respect to this table, it was observed in a leading case that "these tables do show the sense of the Church of England, and so are a proper exposition of the law of God, and, by consequence, ought to have great weight with the judges when they expound the Levitical law; and they are plainly the decision of this reformed church touching the crime of incest; and they do retrench the exorbitant and unwarrantable constructions of the Church of Rome, who made the law of God of none effect by their traditions; and yet they expound the law of God in its full latitude." (*Butler v. Gastrill*, *Gilbert's Ch. R.* 156.)

According to Archbishop Parker's table of degrees, a man may not marry his grandmother, grandfather's wife, wife's grandmother, father's sister, mother's sister, father's brother's wife, mother's brother's wife, his mother, step-mother, wife's mother, his daughter,

wife's daughter, son's wife, his sister, wife's sister, brother's wife, son's daughter, daughter's daughter, son's son's wife, daughter's son's wife, wife's son's daughter, wife's daughter's daughter, brother's daughter, sister's daughter, brother's son's wife, sister's son's wife, wife's brother's daughter, or wife's sister's daughter; and a woman may not marry her grandfather, grandmother's husband, husband's grandfather, father's brother, mother's brother, father's sister's husband, mother's sister's husband, husband's father's brother, husband's mother's brother, her father, step-father, husband's father, her son, husband's son, daughter's husband, her brother, husband's brother, sister's husband, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, husband's son's son, husband's daughter's son, brother's son, sister's son, brother's daughter's husband, sister's daughter's husband, husband's brother's son, or husband's sister's son. (*Vide 1 Bishop on Marriage and Divorce*, § 318, note 2.)

§ 639. Marriages in the ascending and descending line, as between parents and children, are everywhere regarded as monstrous connections and repugnant to the law of nature, and so far the Levitical is a moral law, as contradistinguished from a positive prohibition to the Jews, and binding upon all mankind. (*Harrison v. Ruswell*, *Vaughan's R.* 206. *S. C. 2 Vent. R.* 9.) And it has been laid down in the State of New York that marriages between brothers and sisters in the collateral line, are equally, with persons in the lineal line of consanguinity, unlawful and void, as being plainly repugnant to the first principles of society and the moral sense of the civilized world; but it is thought that the prohibition will not extend further, without a statute prescribing the forbidden degrees. (*Wightman v. Wightman*, 4 *Johns. Ch. R.* 343, 347.)

The canon and common law make no distinction between connections by consanguinity and affinity, although the effect upon the offspring is not the same in the one case as the other. Upon this subject in a leading case in England, the judge observed: "It was necessary, in order to perfect the union of marriage, that the husband should take the wife's relations, in the same degree to be the same as his own, without distinction, and *vice versa*; for if they are to be the same person, as was intended by the law of God, they can have no difference in relations and by consequence the prohibition touching affinity must be carried as far as the prohibition touching consanguinity; for what was found convenient to extin-

guish jealousies amongst near relations, and to govern families and educate children amongst people of the same consanguinity, would likewise have the same operation amongst those of the same affinity. And when we consider who are prohibited to marry by the Levitical law, we must not only consider the mere words of the law itself, but what, by a just and fair interpretation may be adduced from it." (*Butler v. Gastrill, Gilbert's Ch. R.* 156, 158.)

Affinity properly means the tie which arises from marriage betwixt the husband and the blood relatives of the wife, and betwixt the wife and the blood relatives of the husband, consequently while the marriage remains unbroken, the blood relatives of the wife stand in the same degree of affinity to the husband as they do in consanguinity to her. Thus, the father of the wife stands in the first degree of affinity to his son-in-law, as he does in the first degree of consanguinity to his daughter. Relationship by affinity may also exist between the husband and one who is connected by marriage with a blood relative of the wife. Thus, when two men marry sisters, they become related to each other in the second degree of affinity, as their wives are related in the second degree of consanguinity. But there is no affinity between the blood relatives of the husband and the blood relatives of the wife. (*Paddock v. Wells, 2 Barb. Ch. R.* 331, 333. *Vide also Charles v. John, Year Book, 41 Edw. 3, p. 9.*)

The relationship by consanguinity is, in its nature, incapable of dissolution; but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of his wife, he may lawfully marry her sister. Such is the doctrine in Vermont and most of the American States, although in England a man is not permitted to marry his deceased wife's sister. (*Blodget v. Brinsmaid, 9 Vt. R.* 27.)

Whether it be proper or lawful, in a religious or moral sense, for a man to marry his deceased wife's sister, has been much discussed in the American States, especially by essayists and in the church judicatories, and both sides of the question have been sustained with great ability. Such a marriage, however, is not forbidden by the statutes of any of the states, unless it be by the Code of Virginia. It has been so held in Virginia, and probably the law is the same there now. (*Commonwealth v. Perryman, 2 Leigh's R.* 717. *Vide also Hutchins v. Commonwealth, 2 Va. Cases, 331.*

Commonwealth v. Leftwich, 5 *Rand. R.* 657. *Kelly v. Scott*, 5 *Gratt. R.* 479.) But in several of the states, the practice has been expressly or impliedly sanctioned by judicial authority. (*Paddeck v. Wells*, 2 *Barb. Ch. R.* 331. *Blodget v. Brinsmaid*, 9 *Vt. R.* 27. *The State v. Shaw*, 3 *Ired. R.* 532. *Moses v. The State*, 11 *Humph. R.* 232. *Morgan v. The State*, 11 *Ala. R.* 289. *Goodall v. Thurman*, 1 *Head's R.* 209. *Greenwood v. Curtis*, 6 *Mass. R.* 358, 379.) As before intimated, under the English statute, it is incestuous for a man to marry his deceased wife's sister, or for a woman to marry her deceased husband's brother. (*Hill v. Good*, *Vaugh. R.* 302. *Harris v. Hicks*, 2 *Salk. R.* 548. *Ray v. Sherwood*, 1 *Curt. Ec. R.* 173. *Regina v. Chadwick*, 12 *Jur.* 174. *Aughtie v. Aughtie*, 1 *Phillim. R.* 201.) And in most Catholic countries such marriages are formally prohibited, while in most Protestant countries they are lawful. Under the statute in force in England, it has been held that the marriage of a man with the daughter of the half sister of his deceased wife, is null and void; and further that a marriage within the prohibited degrees of consanguinity or affinity, is null and void, although one of the parties is illegitimate. (*The Queen v. Brighton*, 101 *Eng. C. L. R.* 446.)

§ 640. By the statute of New York, marriages between parents and children, including grandparents and grandchildren of every degree, ascending and descending, and between brothers and sisters of the half, as well as the whole blood, are declared to be incestuous and absolutely void; and the prohibition extends to illegitimate as well as legitimate children and relatives. (2 *Rev. Stat. part 2, ch. 8, tit. 1, § 3.* 2 *Stat. at Large*, 144.)

The law of Massachusetts upon the subject is substantially the same as in New York. (*Gen. Stat. ch. 106, §§ 1-6.*)

It has been held that a marriage, valid where it was contracted, is valid in Massachusetts, if not incestuous by the law of nature, or not made void by the statute in regard to residents of the state going out of the state and there having their marriage solemnized, when such marriage, if solemnized in the state, would be void; and, in the same case, it was decided that the intermarriage of a man and his mother's sister, though void by the statutes of the state, is not incestuous by the law of nature, and was not void by the law of England before the statute of 6 William IV, chapter 54, though it was voidable by process in the ecclesiastical courts, and, therefore, such a marriage celebrated in England, between a man

and his mother's sister, and never avoided there, though absolutely prohibited by the Massachusetts statute, was, nevertheless, recognized as binding in that state. (*Sutton v. Warren*, 10 *Metcalf's R.* 451.)

By the statutes of Pennsylvania all marriages within the degree of consanguinity or affinity, according to the table established by law, are declared void to all intents and purposes; and the table of forbidden degrees established by the statute is about the same as that established in England, except the grandparents of the parties are not mentioned, and some of the more distant collateral relatives are omitted. (*Laws of 1860, Purdon's Dig.* 346.)

Other states have similar enactments to those already referred to, and probably in most of them marriages within the prohibited degrees are, by statute, absolutely void.

§ 641. Another and fifth impediment to marriage, proper to be noticed, is that which sometimes obtains by reason of race or color and civil condition. In some countries and states statutes exist to prevent intermarriages between the white races and people of color; and, under the civil law, certain persons were prohibited from joining in marriage because of their civil condition. Thus, in several of the United States, marriages are positively forbidden between the white and colored races, and occasionally a very nice question has been presented to the courts respecting the meaning of the words "negro," "mulatto," "persons of color," and "white persons." In one case, in the State of Maine, Shepley, Ch. J., observed: "There is a difference of opinion respecting the proportion of African blood which will prevent a person possessing it from being regarded as white. Some courts appear to have held that a person should be so regarded when his white blood predominated both in proportion and in appearance. Those least disposed to consider persons to be white who have any proportion of African blood have admitted that persons possessing only one-eighth part of such blood should be regarded as white." (*Bailey v. Fiske*, 34 *Maine R.* 77.) Most of the late slave states had statutes prohibiting intermarriage between free negroes and slaves, but all of those laws have been either repealed or become obsolete, and but few of the states have statutes, at present, positively prohibiting intermarriages between white persons and persons of color. (*But vide The State v. Walters*, 3 *Ired. R.* 455. *The State v. Fore*, 1 *ib.* 378. *The State v. Hooper*, 5 *ib.* 201. *The State v. Roland*, 6 *ib.* 241.

The State v. Milton, Busbee's R. 49. *Barkshire v. The State*, 7 *Ind. R.* 389. *The State v. Brady*, 9 *Humph. R.* 74.)

Mr. Burge, in his treatise upon the colonial and foreign laws, observes: "There were certain impediments to marriage peculiar to the civil law, which are not adopted in the codes of other countries. These were impediments described as being *ex causa potestatis*. Thus, a tutor or curator could not marry his ward until his office had terminated, or unless his accounts had been passed. A person administering a government, or public office, in a province, and the members of his family, were not permitted to intermarry with a person domiciled in his province, unless they had been betrothed to each other before he had accepted the office. Notwithstanding these prohibitions, the subsequent voluntary cohabitation of the parties, after the relation which caused the prohibition had ceased, rendered the marriage valid *ab initio*." (1 *Burge's Colonial and Foreign Laws*, 138.)

So, also, no person is permitted to marry a ward of the court without the express sanction of the court; and if a man should marry a female ward without the consent and approbation of the court, he will be treated as guilty of contempt, even though he was ignorant of the fact that she was a ward of court. And when there is reason to suspect an intended and improper marriage without its sanction, the court will, by an injunction, not only interdict the marriage, but also interdict communication between the ward and her admirer. (2 *Story's Eq. Jur.* §§ 1359, 1360.) This may not be regarded as strictly an *impediment*, but it is a provision of law to secure due marriages and protection to infants very proper to notice. The interdict of marriages between persons of the white and colored races by statute is becoming more and more uncommon, as experience has shown that the matter may very properly and safely be left to the education, taste and customs of the people.

§ 642. By the civil law, persons in a state of slavery or servitude are not entitled to the rights and considerations of matrimony, and hence, there is no recognized marriage relation in law between slaves. Nor were slaves under the civil law proper objects of cognation or affinity, but of *quasi-cognition* only. (*Taylor's Elements of Civil Law*, 429. *Cooper's Justinian*, 411, 420.) *Contubernium* was the matrimony of slaves; a permitted cohabitation not partaking of lawful marriage, which they could not contract. The same disability applies at the present day in the case of slaves

wherever slavery exists. The state of slavery in Cuba, and in Brazil, and lately in this country, compares with that existing under the Roman law in many respects. The progress of society in civilization, more correct notions on the subject of moral obligation, and, above all, the benign influence of the Christian religion, have softened many of the rigors attendant on slavery among the ancients; but the rights of the slave in respect to marriage remain substantially as under the civil law. The Hebrew law did not recognize marriage among slaves of other than Hebrew origin, although a relation existed similar to the *contubernium* of Rome. The marriage of free men and women with slaves was very much discouraged by the laws, civil and ecclesiastical, of the middle ages. Heavy penalties were annexed, and the right was even conceded to parents to kill their children who persisted in such an alliance. The question was submitted to the See of Rome, whether a free man might put away a wife taken from the servile class, and take a free woman to his bed; and Leo responded in the affirmative. The contract of marriage not being recognized among slaves, none of its consequences follow from the contubernial state existing between them. (*Cobb on Slavery*, §§ 273, 274.) But this question has ceased to be of much interest in this country, as slavery no longer exists here; and it is to be hoped that the inhuman institution will soon be abolished throughout the civilized world.

§ 643. The sixth and last impediment to marriage, is a prior marriage, or having another husband or wife living, in which case, besides the pains and penalties consequent upon the act as a felony, the second marriage is to all intents and purposes absolutely void. Such is the common law upon the subject, and the same may probably be said to be the law in all of the American States and territories, except the territory of Utah. Polygamy is condemned both by the law of the New Testament and the policy of all Christian states. For example, by the statutes of New York, it is declared that no second or subsequent marriage shall be contracted by any person during the life-time of any former husband or wife of such person, unless the marriage with such former husband or wife shall have been annulled or dissolved for some cause other than the adultery of such person; or unless such former husband or wife shall have been finally sentenced to imprisonment for life; and every marriage contracted in violation of this provision shall be absolutely void; except that if any person whose husband or

wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the life-time of such absent husband or wife, the marriage will be void only from the time that its nullity shall be pronounced by a court of competent authority. And, further, no pardon granted to a person sentenced to imprisonment for life shall restore such person to the rights of any previous marriage. (2 *Rev. Stat. part 2, ch. 8, tit. 1, §§ 5, 6, 7.* 2 *Stat. at Large*, 144, 145.)

Under these provisions of the statute it has been held that when the husband has been absent more than five years, and his wife has contracted a second marriage in good faith, her husband not being known to her to be living within the five years, a cohabitation with the second husband after the mistake is discovered will not entitle the first husband to a divorce on the ground of adultery. The last marriage being voidable merely, but not void, the remedy of the first husband is by a bill to annul the voidable marriage. (*Valleau v. Valleau*, 6 *Paige's Ch. R.* 207.) And it has been further held that such second marriage under such circumstances, can be declared void only on the application of one of the parties to it, during the life-time of the other; and that it cannot be declared void collaterally, after the death of the first husband in actions instituted by creditors. (*Cropsey v. McKenney*, 30 *Barb. R.* 47. *Vide also Cropsey v. Ogden*, 11 *N. Y. R.* 228.)

In the State of Massachusetts, the statute upon the subject, except that the provision with respect to the absence of one of the parties under the circumstances suggested is seven years instead of five, as in New York. (*Gen. Stat. ch. 106, § 4, ch. 107, § 30.* *Vide Commonwealth v. Mash*, 7 *Met. R.* 472.)

In this state it has been held that when a man is divorced for adultery, and marries again during the life of his former wife, his last marriage is absolutely void. (*Commonwealth v. Hunt*, 4 *Cush. R.* 99.) But when a marriage in this state is entered into by a woman previously married in another state, and then divorced for the acts of the husband which would not be a cause of divorce in this state, it was held that the last marriage was valid, although contracted while her former husband was still living. (*Clark v. Clark*, 8 *Cush. R.* 385.)

In the State of Ohio, the provisions of the statute are similar to those of New York upon the subject, except that the absence must

be continual and willful for three years next before the second marriage in order to justify the marriage. (1 *Rev. Stat. ch.* 71, § 1.)

If there be no statute regulation, the common law doctrine will prevail; and the second marriage, while the first remains undissolved by a competent court, or by the death of one of the parties, will be actually void, and, being void, it imposes no legal restraint upon the party imposed upon from contracting another, though, as has been well said, prudence and delicacy impose a restraint in such case until the fact is so generally known as not to be a matter of doubt, or until such marriage has been impeached in a judicial proceeding, whenever that may be done. (*Patterson v. Gaines*, 6 *How. U. S. R.* 550, 592. *Vide also Martin v. Martin*, 22 *Ala. R.* 86.) Of course, if the first marriage was void, it is no impediment to the second; and, unless the first was a valid marriage, the parties may contract a second without procuring a judicial sentence annulling the first.

The general rule is, that the validity or invalidity of a marriage is to be determined by the *lex loci contractus*. Thus, it has been held in the State of New York, that where a former marriage has been dissolved on account of the adultery of the husband, he cannot contract a valid second marriage during the life of the former wife. To bring a case within the prohibition of the statute, and render the second marriage void, it is enough that there was a prior marriage, and that the former wife was living at the time of the second marriage. It is not material that the former marriage should have taken place within the state. (*Smith v. Woodworth*, 44 *Barb. R.* 198.)

CHAPTER XL.

PARTIES TO A MARRIAGE—THEY MUST BE WILLING TO CONTRACT—
DURESS—FRAUD—ERROR—PARTIES MUST CONTRACT IN PROPER FORM
—VOID AND VOIDABLE MARRIAGES—IMPERFECT MARRIAGE—HOW
NULLIFIED—EFFECT OF THE SENTENCE OF NULLITY.

§ 644. THE parties to a marriage must not only be *able* to contract, but they must be *willing* to join in the matrimonial union. If the free and voluntary assent of the parties in contracts pertaining to the ordinary business concerns of life. is important and

requisite to bind the parties, much more is it in a contract of marriage, which involves, to the greatest extent, all that is sacred and enjoyable in social life. The parties must be perfectly free to give their consent to the nuptials, or the contract will not be binding, and the marriage may be avoided. Upon this principle, a marriage contracted by a party under compulsion is void, because *consent* is the essence of this, as it is of *all* contracts, and when there is compulsion there is no consent. Besides, such an agreement would be founded in *wrong*, and would be void on that account. The violence was itself an injury to the party compelled to give his assent, and the party on whose behalf the violence was used cannot be permitted to establish a right on his own wrong doing. The consent of the party brought about by force, menace or duress, is a consent only in *form*, and is of no legal effect. This is the rule as applied to all contracts, and it finds no exception in marriage; and the same principles which govern the question of duress in other contracts, hold good in their application to marriage. It is not, however, all cases of compulsion or coercion which will invalidate the marriage contract, it must amount to *duress*, or duress, and this may be either actual violence, or threat. As civilization has advanced, the law has tended much more strongly than it formerly did to overthrow every thing which is built upon violence or threats producing fear. In the time of Cæsar, it was said that a man could not avoid his act on the ground that it was procured by the fear of battery, burning his house, taking away or destroying his goods, or the like; for the reason that he may have satisfaction by the recovery of damages. But this is not the rule at the present day, and especially not in a case of marriage, when the injured party cannot be compensated in damages for the wrong. There can be no doubt that a contract of marriage procured by threat, and the fear of personal injury, or the destruction of property, may be avoided on the ground of duress. There is nothing in such a case but the *form* of a contract without the substance. It wants the voluntary assent of the party to be bound by it, and no good reason can be assigned for upholding it. So cautiously does the law watch over all contracts that it will not permit any to be binding but such as are made by persons perfectly free, and at full liberty to make or refuse such contracts, and that not only with respect to their persons, but in regard to their goods and chattels also. Contracts to be binding must not be

made under any restraint or fear of their persons, otherwise they are void. (*Vide Sasputas v. Jennings*, 1 Bay's R. 470. *Collins v. Westbury*, 2 ib. 211. *Nelson v. Suddarth*, 1 Hen. & Munf. R. 350. *Foshay v. Ferguson*, 5 Hill's R. 154, 158.) This is the rule and the reasoning in ordinary business transactions, and it applies with equal or more force in the momentous transaction of marriage.

§ 645. But the rule will be better illustrated by a reference to cases directly in point upon the question of marriage. The maxim of the civil law, *nuptias non concubitas sed consensus facit*, has been regarded as a good definition of marriage, and mutual consent makes the marriage before consummation, but the consent must be full and free, or the marriage is not valid. In deciding upon the question of the sufficiency of the *assent* to the marriage, the court will look principally to the facts which transpired at the espousals; and it has been held that the circumstance of a party being under *arrest* as the *putative* father of a bastard child, is not enough to avoid the contract on the ground of duress. This decision was pronounced with respect to a case where the husband was in the custody of an officer on a proceeding instituted against him as the putative father of a bastard child of which the wife was pregnant, and while he was under the arrest, the nuptials were celebrated; but the evidence was very satisfactory that the parties went before the officer who married them expressly for the purpose of solemnizing their matrimonial contract, and yielded their several consent to it. It was, of course understood that the necessary consequence of the marriage was a discharge from the arrest and from any liability in the proceeding, but that was no reason why any force, fear or threats in the transaction should be inferred. The court felt bound to confine their attention almost exclusively to the facts attending the espousals before the magistrate, and in doing so they could not say that the mere circumstance that the husband had involved himself in difficulty with the authorities by his previous connection with the proposed wife, was enough to show that he did not yield his full and free assent to the marriage solemnized, though he may have taken the step with reluctance. The court therefore held that the marriage was valid. (*Jackson v. Winne*, 7 Wend. R. 47.) But if, in this case, it had clearly appeared that the husband submitted to the marriage by reason of threats of injury to his person, or character or property, made at the time of the espousals, the result would have been different. Mr. Bishop, in his treatise

on marriage and divorce, gives the substance of a case decided by one of the judges of the supreme judicial court of Massachusetts, involving this question; wherein it appeared that the husband had been unlawfully arrested by a deputy sheriff at the instance of two selectmen, and taken to the office of a magistrate, where he was charged with being the father of a bastard child born of the proposed wife, and the selectmen threatened to shut him up in jail and imprison him, if he refused to marry the woman who was then present, or pay them five hundred dollars, all which threats were made while he was held in close custody by the selectmen and the deputy sheriff, and he, being unable to pay the money, and through fear of being deprived of his liberty, and while surrounded by the deputy sheriff and his associates, consented to marry the woman, and while still continuing in the custody of the deputy sheriff, the marriage ceremony was performed, whereupon he immediately left the woman and never had connection with her; it appearing also as a fact that the officer at the time of making the arrest, had no warrant or precept, nor had he any warrant during all the time the man was in his official custody; the court declared the marriage null and void for duress and illegal restraint. (*Jones v. Smith*, 1 *Bishop on Marriage and Divorce*, § 213.) Stress was however laid in this case upon the fact that the arrest and restraint were without process and illegal.

And in another case, decided by the supreme judicial court of Massachusetts, before the full bench, the rule was laid down that a promise of marriage made while the party is under an arrest which is illegal, is void; and, further, that not only is a direct promise void, if made under duress and an illegal arrest, but so is an admission thus made of a former promise, the court saying: "There is no distinction between a promise to marry and an acknowledgment that such promise had been made upon some former occasion, upon which the rejection of the former and the admissibility of the latter can be justified and defended. The general principle is that neither acts done nor declarations or admissions made by a party under duress shall be allowed, against his objection, to operate injuriously to him. He is not bound by a contract, nor held responsible for concessions or acknowledgments made in such an exigency. He may avoid his deed, when so executed, if he will; and the law will reject the evidence of his confessions, if objected to, when they were induced by means of, or uttered while he was

subject to, such unlawful restraint. It is the presumption, sanctioned by the law, that confessions made under such circumstances are the result of fear, apprehension, and of the consequences to result from the force, violence, or compulsion applied. And because it is impossible to measure the extent of the controlling influence which such causes may exert, and, of course, impossible to determine whether any or what reliance ought to be placed, or what effect should justly be given to acts done, or to declarations made by a party held in such condition, it has come to be an established principle of law that the evidence of whatever has transpired while a party is under duress shall, upon his objection as to the party by whom it was occasioned, be altogether disallowed and rejected." (*Tilley v. Damon*, 11 *Cush. R.* 247, 251. And *vide also Regina v. Baldey*, 5 *Cox's R.* 523. *S. C.* 2 *Denison's Crown Cases*, 430.)

The case of *Tilley v. Damon* was an action for breach of promise of marriage, but the principles stated apply equally to the marriage, where the same has never been subsequently ratified, or the duress waived.

In England a marriage, though celebrated in *facie ecclesiæ*, was formerly held to be void by judges of the common law, before sentence of nullity, if the wife were under duress, though such a marriage is now held binding until its nullity is declared by a competent court. And, in a very early case, where an heiress had consented to marriage, but the consent was caused by precedent menaces, the defendant had judgment to die. Hale, treating of the case, says the reason she gave evidence was, first, she was rescued, *flagrante crimine*, before she was defiled; second, it was a forced marriage, and so no marriage *de jure*; third, no cohabitation; fourth, there was concurrent evidence to prove the whole fact, and she was a good witness, being but a wife *de facto*. (*Rea v. Brown*, 3 *Kib. R.* 193.) It is difficult to conceive of a reason why a marriage, confessedly the most important of all contracts, should be held valid when obtained by duress, while all other contracts are not so; and, whatever difference of opinion formerly existed upon the subject, the invalidity of such a marriage is now universally conceded.

§ 646. Another instance of marriage under a constraint of the will, whereupon the consent which in form passes is no consent in fact, is where the party is induced to join in the marriage by a

fraud. It is not, however, every misrepresentation or deception that will affect the validity of the marriage. The law presumes that a person uses due caution in a matter in which his happiness for life is so materially involved as in that of matrimony, and it therefore makes no provision for the relief of a blind credulity, however it may have been produced. (*Wakefield v. Mackay*, 1 *Phillim. R.* 134.)

The phrase *fraudulent contract*, in common parlance, admits of great latitude of construction, and will include all those deceptive acts to which the sexes too frequently have recourse, with a view to obtain what they consider an advantageous connection; by setting off their persons, characters, tempers, circumstances and connections in a too favorable light; or by professions of ardent affection, which they either may not feel, or not in a degree equal to what they profess. These acts, though they meet with various degrees of indulgence, according to circumstances, are still inconsistent with truth and sincerity; and may be, and often are, productive of serious mischief; they partake of the nature of fraud, and a marriage grounded on them is, in a sense, a *fraudulent contract*. If the phrase be taken in this large sense, it would degrade the marriage contract, which in its original design and institution was to continue indissoluble during the joint lives of the correlates, and which is a main pillar on which society itself is founded, to a level with the most trifling bargains. This aspect is not tolerated by the courts. (*Vide Benton v. Benton*, 1 *Day's R.* 111.)

But the authorities are clear that where there is actual fraud in the transaction, a marriage, like all other contracts, may be avoided by the party injured. In a case in the late court of chancery of the State of New York, it was expressly decided that a marriage procured by abduction, terror or fraud would be annulled by the court. This was before there was any statute there declaring such a marriage invalid. The chancellor found that the marriage in the case was procured by fraud, saying that the woman had been entrapped into the marriage with the man by the artifices which he employed; and though she gave an apparent consent at the moment of the celebration, yet it fully appeared that this consent was feigned, and that it was the effect not of her choice, but of her terror. The complainant had never consented freely to become the wife of the defendant, and had never cohabited with him; and the marriage was declared to be a foul fraud practiced

upon her by the defendant, and on that ground was adjudged to be utterly null and dissolved. (*Ferlat v. Gojon*, *Hop. Ch. R.* 478.)

In the argument of the case of *Ferlat v. Gojon*, on behalf of the complainant, the late Mr. Sampson, of the city of New York, most forcibly and eloquently remarked: "Here is a contract obtained by fraudulent contrivance, by suppressions of the truth and suggestions of falsehood, by duress and by surprise, entered into by a girl of nineteen, in a moment of great agitation and apprehended danger, no matter whether real or imaginary; the consequences of which must blast her maiden honor, endanger her virtue, and bring her tender parent who bore her, with anguish to the grave. And is there no relief, no helping hand, no mercy or justice in the law? Are we yet, with all our boasted institutions, in that state of uncivilized barbarity; with all our subtle and refined distinction, with all our infinity of books and cases, can we find no remedy for such an evil? Must fraud and conspiracy triumph with impunity, and youth and innocence droop and decay, like a tender blossom on a wounded stem, and no one be found to bind it up or shelter it? Is it because this contract is so holy, and beyond all others so sacred, that our laws are too unholy and profane to meddle with it? Must our judges, for very reverence, look on, and shutting their ears to the cries of religion and humanity, turn their backs upon the desolating ruin? Must the poor victim of iniquity be doomed to suffer all the consequences of an ill-omened and barren union; be bound forever to honor and obey one whom she cannot honor and obey, because we have no spiritual court, no doctors' commons, no doctors or proctors? Must this be the answer of the only earthly judge to whom we can appeal? Address your complaint to the great Judge of judges; no doubt your prayers will find grace in heaven; but our law allows you nothing but to weep and to despair; for we cannot excommunicate, and there is no other remedy." The difficulty was not in the fact that the marriage was not invalid, but as to where was the proper forum to seek the remedy. Now, however, the statute provides that in such a case a sentence of nullity may be declared by the supreme court. Indeed, that part of the ancient common law of England which rendered a marriage absolutely void, where either of the parties had not the legal capacity to contract matrimony, or where there was in fact no legal consent by one of the parties, the same having been obtained by force and fraud, and never afterward

voluntarily acquiesced in, was undoubtedly brought to this country by our ancestors, and formed a part of the colonial law. In such cases, for all the substantial purposes of justice, the courts of common law and of equity in England had concurrent jurisdiction with the ecclesiastical courts. Although the other courts yielded to the courts Christian the exclusive jurisdiction to declare the nullity of the marriage by a direct proceeding between the parties, it was rather on the ground of convenience than from a want of power in the court of chancery to grant similar relief to the parties. The court of chancery and courts of common law always exercised the power to determine the marriage absolutely void, whenever the question came before them in any collateral proceeding. (*Botsworth v. Botsworth*, *Styles' R.* 10. *Riddleston v. Wogan*, *Cro. Eliz.* 858.) In those cases the sentence of the ecclesiastical courts does not dissolve the marriage, inasmuch as no lawful marriage can have taken place. It merely declares the fact of marriage to be a nullity. The marriage act declares marriages in such cases to be *ipso facto* void. The sentence of the ecclesiastical court is declaratory only; it does not make them void. (*Bowzer v. Ricketts*, 1 *Hagg. Con. R.* 214.) In such cases, where the rights of the parties existed independent of any peculiar remedies which were intrusted to the exclusive cognizance of a particular court, it was competent for the superior courts of the colony to administer such relief as was consistent with their ordinary forms of proceedings in other cases, and such as was proper under the circumstances of each case. Jurisdiction in such cases is usually conferred upon certain specific courts by statute in this country; but in the absence of any statutory provision, the ordinary courts of equity have the power to grant the proper relief. (*Perry v. Perry*, 2 *Paige's Ch. R.* 501, 504, 505.)

§ 647. It may be laid down as a general proposition that the law regards a marriage brought about by fraud as invalid if the fraud is such as would vitiate any other contract, unless the marriage has been consummated by copulation. (*Vide Hartford v. Morris*, 1 *Hagg. Con. R.* 423. *Portsmouth v. Portsmouth*, 1 *Hagg. Ec. R.* 355. *Jolly v. McGregor*, 3 *Wilson & Shaw's R.* 85. *Clark v. Field*, 13 *Vt. R.* 460. *Keyes v. Keyes*, 2 *Fost. [N. H.] R.* 553. *Robertson v. Cole*, 12 *Texas R.* 356. *Hull v. Hull*, 5 *Eng. L. and Eq. R.* 589. *S. C.* 15 *Jur.* 710.) In an early case before the late court of chancery of New York, the chancellor laid down the rule

that, independent of statutory provision, the power of that court to vacate contracts obtained by fraud is an unquestioned branch of its jurisdiction; a gross fraud in obtaining a marriage falls within such jurisdiction, and the court adjudged such a marriage void. (*Burtis v. Burtis*, *Hop. Ch. R.* 557, 568.)

In a more recent case in the present supreme court of New York, where it appeared that the *consent* of a minor female to a marriage contract was obtained by *fraud*, through a plot of the pretended husband, in which the priest shared pretty largely, it was held that the marriage was a nullity, and a disgrace to the men concerned in it. The consent was obtained by inflaming the brain and stupefying the senses of the young woman, in which state the nuptials were celebrated, but she immediately refused, and ever after refused, to cohabit with her pretended husband, or to acknowledge any claims on his part in that or any other character. (*Sloan v. Kane*, 10 *How. Pr. R.* 66.)

And in a case in the late court of chancery of the State of New York, where the parties were white persons, and the complainant was charged by the oath of the defendant as the putative father of her bastard child, and the complainant thereupon, believing the child to be his, married her to obtain his discharge from the proceedings against him under the bastardy act, and he subsequently ascertained that the child was a mulatto, and that the defendant knew that fact at the time she swore it to be his, she then having been delivered and saw the child; the court held that the complainant was entitled to a decree declaring the marriage contract void, on the ground that his consent was obtained by fraud. However, if a party knowing that he cannot be the father of a bastard child, is induced to marry the mother to avoid a prosecution, it is no ground for annulling the marriage contract on the ground of fraud, although he should afterward be able to establish the fact that the child was not his; and although it is legally impossible that a white man should have a mulatto child by a white woman, yet if the former, before the birth of the child, believing it to be his child, married the mother on the ground of such belief, it seems he cannot have a decree annulling the marriage, notwithstanding her concealment of the fact from him that she had received the embraces of a negro about the time she was receiving his. The material element of fraud would not then be so patent. But if the mother *knew* that her child was black at the time she charged

the man with it, no person could believe it possible she did not intend to commit a fraud upon him, by charging him as the father of the child, when she had the most satisfactory reasons for believing it could not be his, but that it was in fact the child of a negro, with whom she must also have had connection. (*Scott v. Shufeldt*, 5 *Paige's Ch. R.* 43.) This case of *Scott v. Shufeldt*, illustrates very lucidly the principle upon which a marriage will be regarded as a nullity on the ground of fraud, and the rules by which the courts are governed in the decision of such cases. (*Vide also Hoffman v. Hoffman*, 30 *Penn. R.* 417. *Barent v. Kimmel*, 17 *Leg. Int.* 100.) In a later case in the supreme court of Michigan, where the bill was filed by the husband several years after the marriage to have it annulled on the ground of fraud; the alleged fraud consisting in the woman passing herself off as chaste when she was not, and the bill alleging that the facts had just come to the complainant's knowledge; several children had been born to the parties, and were still living, and no complaint was made of the wife's conduct after marriage; the court very properly dismissed the bill as unprecedented and shameful. (*Leavitt v. Leavitt*, 5 *Am. Law Reg. [N. S.]* 252. *S. C.* 13 *Mich.* 452.)

§ 648. It is generally necessary that one of the parties is implicated in order to nullify a marriage on the ground of fraud; the conspiracy even of third persons will not in general have the effect to invalidate the marriage when the party to the marriage was not one of the conspirators. Upon this subject, Lord Stowell said: "I will not lay it down that in no possible case can a marriage be set aside on the ground of having been effected by conspiracy. Suppose three or four persons were to combine to effect such a purpose by intoxicating another and marrying him in that perverted state of mind, this court would not hesitate to annul a marriage on clear proof of such a cause connected with such an effect. Not many cases occur to me in which the co-operation of other persons to produce a marriage can be considered, if the party was not in a state of disability, natural or artificial, which created a want of reason or volition, amounting to an incapacity to contract." (*Sullivan v. Sullivan*, 2 *Hagg. Con. R.* 238, 246.)

In a recent case in the State of Vermont, the court declared a marriage void on the ground principally, that it was effected through the conspiracy of third persons. The court said: "We are satisfied that the form of marriage was brought about between

these parties, chiefly through the instrumentality of certain inhabitants of Moretown, who had charge of maintaining the town's poor, for the purpose of changing the settlement of the petitioner, and to effect this they promised the husband \$100, and paid him \$60 ; that his purpose was not to contract in good faith, a marriage, but to get money and revenge an imaginary grievance against Middlesex, and abandon the petitioner, which he did in about three weeks. She is a cripple, feeble both in body and mind, and was wholly at the disposal of those who had her in charge. It is difficult to lay down any general rule in regard to the precise character of fraud which will render null a marriage contract. But we are reluctant to say that such a transaction as the present is to receive the countenance of the courts of the state. It would, we think, be of evil example. The transaction possesses no one feature of a marriage contract but the ceremony. The cohabitation, so long as it continued, seems to have been, on the part of the petitioner, the result of the general imposition ; and on the part of the defendant a part of the attempted villainy. A decree of nullity, if it have no other good effect (and, as to the parties, it seems to be of no great importance, both being virtual paupers), will deprive the conspirators of the wages of their iniquity, and be of good example to others. We are not satisfied there was any such duress in the case as to justify a decree of nullity. But one of the chief actors testifies that he told the petitioner the laws were so altered that the town authority said they had a right to marry paupers to whom they saw fit ; and the petitioner testifies that she believed it, and supposed that if she refused to submit to the marriage she should be left to starve. It is impossible to know how much such badinage might have influenced so simple a creature in the outset ; but we are not satisfied she finally acted under the delusion, and still she might have done so. Petition granted." (*Barnes v. Wythe*, 28 *Vt. R.* 41.)

This was an extreme case, and it is quite probable that the apparent duress and want of mental capacity in the petitioner had something to do in producing the decision of the court. Usually, if the party is capable of consenting to the marriage, and has consented, the law does not ask how the consent was induced. His own consent, however procured, is his own act, and he must impute all the consequences resulting from it either to himself or to others whose happiness he ought to have consulted, to his own responsi-

bility for that consent. The law looks no further back, provided always that the party has not been wantonly deceived. (*Vide Sullivan v. Sullivan*, 2 Hagg. Con. R. 238, 247. *Rex v. Minshull*, 1 Nev. & Manning's R. 277.)

When one of the parties to the marriage supplies a third person with the means of perpetrating the fraud, or when he is in any way intentionally instrumental in the fraud practiced by a third person, by which the marriage is effected, he is himself responsible for the fraud, and the marriage may be avoided on that ground. When a person knowingly takes the benefit of the fraudulent acts of another, he adopts the act including the fraud. (*Vide Mason v. Crosby*, 1 Woodbury & Minot's R. 342. *Fisher v. Boody*, 1 Curt. C. C. 206. *Wilson v. Green*, 25 Vt. R. 450.)

§ 649. Sometimes the question of annulling a marriage on the ground of fraud is regulated by statute. Thus, in the State of New York, the statute provides that a marriage may be annulled on the ground that the consent of one of the parties was obtained by force or fraud, during the life-time of the parties, or one of them, on the application of the party whose consent was so obtained, or of the parent or guardian of such party, or of some relative intrusted to contest the validity of the marriage. (2 Rev. Stat. part 2, ch. 8, tit. 1, § 30. 2 Stat. at Large, 149.) Under this statute it has been held that if the defendant in the action by the husband to annul a marriage on the ground of fraud, is an idiot, the complainant must procure the appointment of a guardian *ad litem* to appear and defend the suit for the wife; and when no guardian *ad litem* is appointed for the defendant in such a case, the complainant will derive no benefit from the tacit admission of the fraud charged in the bill, arising from the wife's suffering such bill to be taken as confessed against her. A court of equity will not annul a marriage contract as having been fraudulent upon the mere admission by the defendant of the fact charged in the bill.

The further point was settled in the case, that a suit to annul such a marriage must be brought within six years after the discovery, by the aggrieved party, of the facts constituting the fraud; that the meaning of the provision of the statute in relation to suits of that nature, which declares that a marriage may be annulled on account of force or fraud, *during the life-time of the parties, or one of them*, is not that the suit can be brought at any distance of time after the right to institute it occurred, provided either of the

parties is still living, but that the suit can only be brought during the life-time of the parties, or during the life of one of them, and not afterward. (*Montgomery v. Montgomery*, 3 Barb. Ch. R. 132.) The common law makes the marriage a nullity, which is produced by the perpetration of a fraud upon one of the parties by the other; but the practice in procuring a judicial sentence declaring the nullity of the marriage is usually regulated by statute.

§ 650. Upon this subject, Mr. Fraser, in his excellent treatise on the domestic relations, observes: "Fraud, in the constitution of the contract of marriage, renders it void. Force implies *physical* constraint of the will; fraud, some overruling *moral* necessity, whereby a certain state of the will is brought about which would not have so been without deceit. In both cases the result is the same, although the constraint employed operates differently. And as to both, morality and law visit the deed with the same condemnation." And after citing several cases where the fraud was practiced upon parties who were certainly capable of marriage, but who, from their youth, were peculiarly liable to be deceived, and the nuptials were nullified, he adds: "There are, however, cases where, with regard to persons of mature age, fraud in obtaining the consent to the contract has been held sufficient to annul the pretended marriage. The cases in which this has been sustained are of this nature: The woman gets the man into some retired place, for the purpose of carnal connection, and then, before this is allowed to proceed, she obtains from him a promise of marriage, and copula immediately follows. She has, at the same time, two or three witnesses stationed so as to hear the promise, but concealed from the man. The consent here has been obtained in *æstu amoris*, without any intention on his part, she well knowing it, of entering into marriage, and where, if he had known that there were witnesses to the transaction, he would not have made the promise. The marriage, therefore, being brought about by the fraudulent contrivance of the woman, the court has refused in such cases to sustain." (1 *Fras. Dom. Rel.* 234-237.)

Upon the same subject Mr. Bishop says: "In all cases where the party entering into the form of marriage gives no real consent, because the will is overpowered by the arts of cunning, or the force of menace, or by any other means, the marriage remains a nullity until, as it sometimes happens, the will, in a disenthralled condition, affirms the marriage. Therefore it has been held that,

if one knowing the law entrap another ignorant of it into a ceremony, valid in form, before a magistrate or minister of the gospel, under the representation of its not being binding, which representation is believed, and if the party deceived do not intend it shall be followed by cohabitation without a further public ceremony, and it is not so followed, the marriage is void. And the remark has been made that there may be extraordinary cases in which such marriage would be invalid after consummation." (1 *Bishop on Marriage and Divorce*, § 205. *Vide also Mount Holley v. Andover*, 11 *Vt. R.* 226. *Clark v. Field*, 13 *ib.* 460. *Robertson v. Cowdry*, 2 *West. Law Jour.* 191.)

If a person of a bad character palms himself off as a person of good character by a false name, known by reputation to the person to whom he offers himself, and the party marries him under that deception, the marriage is a nullity. The fact, however, of the assumed name does not vitiate the marriage, provided there is no deception with respect to the real identity of the person bearing such assumed name. (*Rex v. Burton-upon-Trent*, 3 *Moore & Scott's R.* 537. *Heffer v. Heffer*, *Ib.* 265. *Clowes v. Clowes*, 3 *Curt. Ec. R.* 185, 191.) When one person is actually substituted for another, in case of marriage, Chancellor Kent says: "This would be a palpable fraud, going to the substance of the contract, and it would be difficult to state a case in which error, simply, and without any other ingredient as to the parties, or one of them in respect to the other, would vitiate the contract. It is well understood that error, and even disingenuous representation, in respect to the qualities of one of the contracting parties, as to his condition, rank, fortune, manners and character would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced." (2 *Kent's Commentaries*, 77.)

§ 651. In all these cases of duress, fraud, or mistake in respect to the marriage of parties, it may be affirmed as a general rule that the marriage is valid so long as it is acquiesced in by both parties. Again, the guilty party cannot procure a sentence of nullity on his own personal application, and the injured party may ratify the marriage by a free and voluntary cohabitation after the error or fraud is discovered, or the duress is at an end. (*State v. Murphy*, 6 *Ala. R.* 765. *Scott v. Schufeldt*, 5 *Paige's R.* 43. 1 *Bishop on Marriage and Divorce*, § 214.)

This matter is frequently regulated by statute. For example, in the State of New York it is provided that "no marriage shall be annulled on the ground of force or fraud if it shall appear that at any time before the commencement of the suit there was a voluntary cohabitation of the parties as husband and wife, nor on the ground of fraud where there was such voluntary cohabitation with full knowledge of the facts constituting the fraud." (2 *Rev. Stat. part 2, ch. 8, tit. 1*, § 31. 2 *Stat. at Large*, 149.) The rule with respect to all contracts procured by fraud, error, or duress, is, that the injured party may waive the wrong and ratify the contract, after which it is too late to repudiate it, or seek to nullify it. (*Vide Morris v. Morris*, *Wright's R.* 630. *Miller's appeal*, 30 *Penn. R.* 478. *Gilmer v. Ware*, 19 *Ala. R.* 252. *Thompson v. Lee*, 31 *ib.* 292. *Gutzwiller v. Lackman*, 23 *Mo. R.* 168. *Galloway v. Holmes*, 1 *Doug. [Mich.] R.* 330.)

Where both parties are equally in the wrong, the law will never lend its aid to either. The maxim in such a case is, *in pari delicto potior est conditio defendantis*, and it will apply as well in cases of marriage as in other transactions. (*Westfall v. Jones* 23 *Barb. R.* 9. *White v. Crew*, 16 *Geo. R.* 416. *Miller v. Marckle*, 21 *Ill. R.* 152. *Pinckston v. Bevan*, 3 *Jones' Eq. R.* 494.)

§ 652. Lastly, the parties must not only be *able* and *willing* to contract matrimony, but all of the requirements of law respecting the nuptials must be complied with. In other words, the parties must actually contract themselves in due form of law, to make a good and valid civil marriage. What observances are requisite in the celebration of a marriage has been fully discussed in several sections of a preceding chapter (*ante*, §§ 622-632), and it is hardly necessary to dwell upon the subject here. Suffice it to say, that in no case can a marriage be avoided by reason of the non-compliance of the parties with any given ceremony or form in its solemnization, unless the statute makes the same a pre-requisite to a valid marriage. In most of the states the marriage is held to be valid and binding notwithstanding it is entered into with no rites or ceremonies. (*Clark v. Clark*, 10 *N. H. R.* 383.) And a valid marriage may exist without any formal solemnization. (*Clayton v. Wardell*, 4 *N. Y. R.* 230.) At all events, a precise compliance with all the requirements of law is never deemed necessary to the validity of the marriage; and in some important provisions it has been held that a disregard of them might be punishable, but did

not vitiate the marriage. For example, by the statutes of New York, it is provided that marriages shall be solemnized only by ministers of the gospel and certain specified civil magistrates, and if the same is solemnized contrary to a certain provision of the statute, the minister or magistrate officiating is deemed guilty of a misdemeanor (2 *Rev. Stat. part 2, ch. 8, tit. 1, §§ 8, 11, 12*; 2 *Stat. at Large*, 145, 146); and yet the courts hold that the marriage may be valid without any solemnization at all. (*Clayton v. Wardell*, 4 *N. Y. R.* 230.)

Again, in the State of Massachusetts, the statute requires the solemnization of marriages by ministers of the gospel and certain magistrates, and they are prohibited, under a heavy penalty, from solemnizing marriages of males under twenty-one years of age, or of females under eighteen years of age, without the consent of their parents or guardians; and yet the courts in that state hold that the effect of these and similar statutes is not to render such marriages void, although the statute provisions have not been complied with. The courts hold that such statutes are intended as directory only upon ministers and magistrates, and to prevent, as far as possible, by penalties on them, the solemnization of marriages, when the prescribed conditions and formalities have not been fulfilled. (*Parton v. Hervey*, 1 *Gray's R.* 119.) In the language of Parsons, Ch. J., "When a justice or minister shall solemnize a marriage between parties who may lawfully marry, although without the consent of the parents or guardians, such marriage would unquestionably be lawful, although the officer would incur the penalty for a breach of duty." (*Milford v. Worcester*, 7 *Mass. R.* 48, 54, 55.)

On the contrary, in Maine, where clergymen are authorized by statute to solemnize marriages, if "a stated and ordained minister of the gospel, duly appointed and confirmed for that purpose by the governor and council, for the county in which he resides," it was held that "a marriage solemnized by a minister at his own house, neither of the parties residing in that town, was void, as being against the express provisions of the statute, although not expressly declared to be void by the statute." (*Ligonie v. Baxter*, 2 *Greenl. R.* 102.) So, also, in the State of Tennessee, the supreme court has decided that "to constitute a valid marriage under the statutes, two things are essentially necessary: first, a lawful and proper *authority* for the solemnization of the marriage; second, a

solemnization of the marriage, and performance of the marriage ceremony by a person duly qualified by the acts of assembly of North Carolina and Tennessee, in force in the latter state. If a marriage be celebrated, therefore, *without the license* prescribed by these acts, or in its absence, without a lawful certificate of the publication of the bans of marriage, it is illegal and void," as being in contravention of a positive statute; the judge who delivered the opinion of the court maintaining "that though there are no prohibitory words in a statute, yet, if the act is forbidden under a penalty, a contract to do it is void." (*Bashaw v. State of Tennessee*, 1 *Yerg. R.* 177. *Vide also State v. Grisham*, 2 *ib.* 589.)

But, as before hinted, the weight of authority is in favor of the rule that in the absence of any provision of law declaring marriages not celebrated in a prescribed manner, or between parties of certain ages, absolutely void, all marriages regularly made according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute. This is the general doctrine of the courts, both in this country and in England. (*Par-ton v. Hervey*, 1 *Gray's R.* 119 *Milford v. Worcester*, 7 *Mass. R.* 48. *Londonderry v. Chester*, 2 *N. H. R.* 268. *Haritz v. Sealey*, 6 *Binn. R.* 405. *The King v. Birmingham*, 15 *Eng. C. L. R.* 151. *Cutterell v. Sweetman*, 1 *Robertson's R.* 304.) Of course, when civil government has established regulations for the due celebration of marriages, it is the duty as well as the interest of all the citizens to conform to such regulations. A deviation from them may tend to introduce fraud and surprise in the contract; or by a celebration without witnesses, the vilest seduction may be practiced under the pretext of matrimony. Nevertheless, the marriage may be valid, though solemnized without conforming to the provisions of the statute requiring the publication of the bans, the previous consent of parents or guardians, and the like; provided, that in all cases that the actual consent of the parties to the contract must be expressed in the presence of witnesses, and when required by the statute, in the presence of a minister or magistrate, the law may forbid a particular form or method of solemnization of the marriage, and yet the parties may disregard it, and interchange with each other their mutual consent in any other form, and they will thereby be constituted husband and wife.

§ 653. It must be understood that all irregular or unlawful marriages are not absolutely void; some may be valid and binding,

until repudiated by the parties, or actually nullified by the sentence or decree of a court of competent jurisdiction; while others are null and void from the beginning. There is a great difference between a void and voidable marriage, which it is important to notice. A void marriage is at all times a nullity, and binds no one, and is not valid for any legal purpose whatever; it leaves the parties to it in just the same situation, to all intents and purposes, as though there had been no pretended marriage at all. In such cases, if the parties cohabit, they are adulterers and fornicators, and their offspring, if they have any, are bastards. But a voidable marriage is valid for all civil purposes, and binding upon the parties so long as it is acted upon and recognized by them, and until its nullity is declared by a competent tribunal; and if the marriage has not been dissolved by sentence or decree during the joint lives of the parties, it will be too late to apply for its avoidance, and consequently the survivor will be entitled to curtesy, dower, and the other rights of a surviving husband or wife. If the parties cohabit, their cohabitation, especially as to those who are innocent, is proper and lawful, and their offspring, if they have any, are respected as legitimate; and when the marriage is dissolved, the court usually decrees the custody of the issue to the innocent parent, and makes a provision for their education and maintenance out of the estate and property of the guilty party. When a voidable marriage is set aside, it is rendered void *ab initio*, with the exceptions sometimes in favor of the innocent party, and the issue of the marriage. (*Perry v. Perry*, 2 *Paige's Ch. R.* 501. *Aughtie v. Aughtie*, 1 *Phillim. R.* 201. *Benham v. Badgley*, 2 *Gill's R.* 622.) The difference between void and voidable acts is so important that it lies at the foundation of the rights of parties in all cases of marriage. The general rule is that all canonical disabilities make the marriage voidable, unless a statute otherwise direct, and not *ipso facto* void; but *civil* disabilities make the marriage void *ab initio*, not merely voidable. This is then generally the test: if the disability is canonical merely, the marriage is voidable only; but if *civil*, it is absolutely void. (*Elliot v. Gurr*, 2 *Phillim. R.* 16. *Rex v. Wroxtton*, 4 *Barn. & Ad. R.* 640. *S. C.* 24 *Eng. C. L. R.* 131. *Jaques v. The Public Administrator*, 1 *Brad. R.* 499.)

§ 654. The *canonical* impediments to marriage are consanguinity, affinity, impotence and the like, and they render the marriage void-

able only. Thus, in a case where the widow claimed dower, and it was urged against her demand that she was niece to her deceased husband's first wife, the objection was overruled by the court, because the marriage was not annulled during the husband's life. (*Remington's case*, *Noy's R.* 29.) And in another case, where parties within the prohibited degrees had married, and the marriage had not been declared void during the life of the wife, it was held that the husband surviving was entitled to the administration of the wife's effects. (*Elliott v. Gurr*, 2 *Phillim. R.* 16.)

The *civil* impediments to marriage are prior marriage, want of age, idiocy, lunacy and the like, and these make the contract void *ab initio*. Those disabilities do not dissolve a contract already made, but they render the parties incapable of contracting at all; they do not put asunder those who are joined together, but they previously hinder the junction, and if any persons under these legal incapacities come together, it is a meretricious and not a matrimonial union, and, therefore, no sentence of avoidance is necessary. (*Elliott v. Gurr*, *supra*. *Hemming v. Price*, 12 *Mod. R.* 432.) A sentence of divorce in such cases is only declaratory that the marriage is dissolved, for it was absolutely void before, and either of the parties might marry again, though the other was living. (*Ayliffe's Paregon*, 229. *Aughtie v. Aughtie*, 1 *Phillim. R.* 201.) This is the view that the law takes of the subject, but strictly speaking a marriage entered into by a person under the age of consent, or by a lunatic, cannot be said to be *void*, because it may be ratified after the party becomes of full age, or sane, as the case may be, without any new celebration of the nuptials; simply a voluntary cohabitation of the parties after the disability ceases is generally a ratification of the marriage, and makes it valid. The same rule, as we have before seen, exists in the case of fear, error, or fraud; cohabitation after the duress is removed, or the error or fraud is discovered, makes the marriage good.

§ 655. With respect to the difference between void and voidable marriages, a very able and learned judge of North Carolina has said: "There is a distinction in the law between void and voidable marriages, when even they were regularly solemnized. The latter, which are sometimes called marriages *de facto*, are such as are contracted between persons who have capacity to contract, but are forbidden by law from contracting with each other; as to which, therefore, there was a jurisdiction in the spiritual courts to declare

the nullity of the marriage. But until the nullity was thus declared, as an existing marriage it was recognized as valid both in the canon and common law; and as there can be no proceeding in the ecclesiastical court against the parties after their death, or that of one of them, that event virtually makes the marriage good *ab initio* to all intents, and the wife and husband may have dower and curtesy, and the issue will be legitimate. (*Co. Litt*, 32, 33.) But when the marriage is between persons one of whom has no capacity to contract at all—as where there is a want of age or understanding, or where a prior marriage is still subsisting—the marriage is void absolutely and from the beginning, and may be inquired into in any court.” (*Gathings v. Williams*, 5 *Ired. R.* 487.)

And it was said in a Pennsylvania case by the court: “In like manner do the books of common law resolve, in case of a divorce *a vinculo* for *impotency*, after three years’ trial and examination, and sentence in the spiritual court for the perpetual impotency of generation. As it was in *Bury’s case* (5 *Coke’s R.* 98), who was so divorced, but afterward married another wife, and had children by her; upon which it was urged that, the church being evidently deceived as to his perpetual impotency, the divorce therefore was null; and if so, that the second marriage was unlawful, and the issue illegitimate. But the court resolved that, since there had been a divorce for frigidity or impotence, it was clear that each of them might lawfully marry again; and though it should be allowed that, the church appearing to have been deceived in the foundation of their sentence, the second marriage was voidable, yet till it should be dissolved it remained a marriage, and the issue during the coverture lawful.”

But it was said in a case of impotence disposed of in the English courts: “If the parties should be divorced, and both should have children by the second marriage, these second marriages must be set aside, and the first marriage declared valid, for, where the church appears to have been deceived, the sentence must be revoked.” (*Welde v. Welde*, 2 *Lee’s R.* 580, 586.) Upon this doctrine Sir John Nicholl very justly exclaimed: “What a state to place parties in! This is something in the text law which I cannot readily assent to belong to the law of England.” (*Norton v. Seton*, 3 *Phillim. R.* 147.) And certainly no such doctrine is recognized in any of the American courts. But the common law rule in respect to void and voidable marriages is sometimes modi

fied or changed by the statutes of the state, so that a marriage voidable only in one place may be absolutely void in another, and *vice versa*.

§ 656. With respect to the evidence proper and requisite to establish the marriage of the parties, reference may be had to a previous section wherein the subject is partially treated. (*Vide* § 382.) It may be suggested, in addition, that marriage may be proved, like any other fact, by direct proof from witnesses who were present at the nuptials. But direct and positive evidence is necessary only in cases of bigamy and charges of adultery. (*Patterson v. Gaines*, 6 *How. U. S. R.* 550.) In all other cases marriage may be proved by cohabitation as husband and wife, reputation, and the like. The acts and declarations of a man and woman, and other attending circumstances during their cohabitation together, being a part of the *res gestæ*, are proper evidence to show the character of their intercourse, whether it was matrimonial or meretricious. (*Harman v. Harman*, 16 *Ill. R.* 85. *Henderson v. Cargill*, 31 *Miss. R.* 367. *Ford v. Ford*, 4 *Ala. R.* 142. *Thorn-dell v. Morrison*, 25 *Penn. R.* 326. *Kenyon v. Ashbridge*, 35 *ib.* 157. *In the matter of Taylor*, 9 *Paige's Ch. R.* 611. *Rose v. Clark*, 8 *ib.* 574. *Kahl v. Kraner*, 7 *B. Mon. R.* 130. *Jenkins v. Bisbee*, 1 *Edw. Ch. R.* 377. *Tilts v. Foster*, *Taylor's R.* 121. *And vide Evans v. Morgan*, 2 *Cromp. & Jerv. R.* 453.) But, although the parties cohabit together, and, as regards society, hold themselves out as husband and wife, and other facts indicative of wedlock have been sworn to by witnesses, a court or jury may find that the cohabitation was illicit, and that no valid marriage had taken place. (*Robertson v. Crawford*, 3 *Beavan's R.* 102. *S. C.* 43 *Eng. Ch. R.* 101. *Blackburn v. Crawferds*, 3 *Wallace's U. S. R.* 175.)

An official registry of marriages kept in a church by the clergyman ministering there, or in case no such registry is kept, a private memorandum, in which the minister, in the ordinary course of his business, has entered, or intended to enter, as it occurred, each marriage celebrated by him, seems to be admissible on a question whether such minister ever did or did not celebrate a particular marriage. (*Blackburn v. Crawferds, supra.*)

§ 657. It should be observed more distinctly that there is a difference, when the question of marriage or no marriage arises between the husband and third persons, and when it arises

between the husband and the wife themselves. Much slighter proof will render the husband responsible in the one case than the other. Upon grounds of public policy, a man cannot hold himself out to be that which he is not, without incurring all the responsibilities of his falsehood, a single admission of partnership or marriage may establish a liability where an innocent third person is concerned, and yet such an admission might not go very far to establish a marriage in a case between husband and wife, or in a case involving the legitimacy of the offspring of the parties. The admissions of parties in cases of marriage, as in all others, come within the class of direct proofs. If once established, they are of great weight, especially when made under circumstances which are against the interest, or may be turned to the disadvantage of the party by whom they are made. Like other proof, they can only be repelled by superior proof of the same nature, amounting to a contradiction.

Again, it should be stated that the general and ordinary presumption of the law is in favor of innocence, in questions of marriage and legitimacy, when children are concerned. Cohabitation is presumed to be lawful until the contrary appears, and moreover, in cases of *conflicting* presumptions on the subject of marriage and legitimacy, that in favor of innocence must prevail. (*Physick's appeal*, 4 *Am. Law Reg.* [N. S.] 418, 423, 424. *Sensor v. Bower*, 1 *Penn. R.* 450. *Hill v. Hill's Admrs.* 32 *ib.* 511. *Vide also Starr v. Peck*, 1 *Hill's R.* 270.)

When there is no proof of actual marriage, it seems that cohabitation and reputation are necessary to ground a presumption of marriage; proof of cohabitation alone is not sufficient. Reputation must also be proved, which consists of the speech of the people who have an opportunity to know the parties, to be proved by them. It seems further by the same case, that marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or state, but it must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife, and should be proved by the signature of the parties; or by witnesses present when it was made. (*Commonwealth v. Stump*, 7 *Am. Law Reg.* [N. S.] 61. *S. C.* 53 *Penn. R.*)

§ 658. In regard to the effect of a sentence or decree nullifying a voidable marriage, Mr. Bishop observes: "The doctrine is a broad

one, that, when a marriage is set aside by a decree of nullity, the parties are then considered as having never been married. The children, for example, who were before legitimate, become by force of the decree illegitimate; and the late husband is treated as having never acquired any right to the property of the wife, though the claims of third persons are to some extent protected." (1 *Bish. on Mar. and Div.* § 118.) This delicate and important matter, however, is often the subject of express statutory enactment; and not unfrequently the rights and reputation of the innocent party and the issue of the marriage, are preserved. Sometimes the effect of the sentence of nullity in such cases is declared in the same provision which declares the condition of the parties after an absolute divorce; which will be referred to hereafter, when the subject of divorce is considered.

CHAPTER XLI.

THE LAW OF DIVORCE—MEANING OF THE TERM—HISTORY OF THE REGULATIONS CONCERNING DIVORCE—PRESENT OPINIONS UPON THE SUBJECT OF DIVORCE—THE POLICY FULLY VINDICATED.

§ 659. DIVORCE, in the strict, popular sense, is a dissolution of the matrimonial relation, for causes occurring subsequent to the marriage; but jurists, in treating the subject, usually include those cases in which the marriage is void *ab initio*, for causes existing at or before the celebration of the nuptials, and the sentence of the court simply declares the contract a nullity. It will only be necessary here to consider the subject in the sense first indicated, from the fact that the impediments to marriage by reason of impotence, want of mental capacity, consanguinity, and other antecedent causes which invalidate the relation, have been noticed in a previous chapter. (*Vide ante*, *ch.* xxxix.) And again, the propriety of calling a sentence of nullity of the marriage relation a divorce is very questionable. "The civil and canonical disabilities which render the marriage contract void or *voidable* are grounds of separation for nullity of marriage, but *not*, correctly speaking, for a *divorce*." (*Shelford's Mar. and Div.* 365. *Godol. Ab.* 500.)

There is a general concurrence of opinion throughout the civilized world, that marriage is to be between one man and one woman, and that ordinarily the relation cannot properly be dissolved until a separation by death. In other words, it is generally considered that marriage is an ordinance of God, and "what therefore God hath joined together, no man should put asunder." According to the opinion of some, the interests of society are best consulted by treating the institution as an indissoluble contract in all cases whatever; while to others this rule of policy has appeared far too severe, and they have held that the welfare of society is best promoted by separating the parties, when their happiness is destroyed, and the legitimate ends of matrimony are wholly perverted. The regulations of civilized society upon the subject have generally been in harmony with the latter view, and from the earliest ages of the world, divorces have been granted for certain aggravated causes occurring after the celebration of the marriage, and these causes have been more or less in number, according to the different views of expediency which have been entertained.

§ 660. Among the ancient Jews, who lived under the Mosaic dispensation, it is generally supposed the husband was the sole judge in the premises, and was permitted to divorce his wife at his own pleasure. The rule was thus laid down: "When a man hath taken a wife, and married her, and it come to pass that she find no favor in his eyes, because he hath found some uncleanness in her; then let him write her a bill of divorcement, and give it in her hand, and send her out of his house. And when she is departed out of his house, she may go and be another man's wife." (*Deut.* 24: 1, 2.) But this arbitrary doctrine was repudiated by Christ, who restricted the rule, and perhaps limited it to the single case of adultery. When the corrupt Pharisees came before him, and rallied him concerning the Mosaic law, "he saith unto them, Moses, because of the hardness of your hearts, suffered you to put away your wives; but from the beginning it was not so. And I say unto you, whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and whoso marrieth her which is put away doth commit adultery." (*Matt.* 19: 8, 9.) Strictly rendered, *fornication* can only apply to an offense *before* marriage; but, as antenuptial incontinence was not intended to be put forward as a just cause of divorce, it is altogether probable that the Saviour used the word *fornication* as

synonymous with *adultery*; or, in other words, Christ meant to say that "no cause for separation can be good except adultery, or such facts as had the nature, the *rationem*, of adultery; such as were like it, tended to it, or, in short, would finally defeat and interrupt the destined end of this institution, as adultery actually did." This is the view taken by some very sensible writers upon the subject, and probably this interpretation of the language is the true one. (*Vide Taylor's Elements of the Civil Law*, 351.) The Greek word rendered *fornication* is in many places used as a general term, and in some it necessarily requires to be interpreted adultery; and, in this instance, Christ designed to say that whosoever should put away his wife, except for *unchastity*, which is a violation of the marriage covenant, and destroys, as it were, the very nature of it, and should marry another woman, would be adjudged an adulterer, as he also would that should marry the divorced woman. Whatever injustice there might be in the divorce, it could not be adultery *against* the divorced woman if the man and woman were not put entirely upon a level in this respect; so that, under the Christian dispensation, it is as much adultery for the husband to take another woman as for the wife to take another man. But, according to either interpretation of the passage, where it is lawful to put away the wife, it would seem to be lawful to marry again.

§ 661. The ancient Athenians allowed divorces with great latitude, although the party applying for a divorce was obliged to submit his case to the magistrate, and abide by his judgment, and if the wife was the complainant she was required to appear in person. Hepparete, the prudent and affectionate wife of the great Alcibiades, was forced to quit the house of her husband on account of his associating with so many courtesans, both strangers and Athenians, and finally his debaucheries were so flagrant that she felt compelled to apply for a divorce; but it was necessary for her, in order to a legal separation, to give in her bill to the archon, and to appear personally with it, for the sending of it by another hand would not answer the purpose. When she came to do this, according to law, Alcibiades rushed in, caught her in his arms, and carried her through the market-place to his own house, no one presuming to oppose him or to take her from him. From that time she remained with him until her death, which happened not long after, when Alcibiades was upon his voyage to Ephesus. The

violence used in this case seems not to have been contrary to the laws, either of society in general, or of that republic in particular, for Plutarch says that the law of Athens, in requiring her who wanted to be divorced to appear publicly in person was probably intended to give the husband an opportunity to meet with her and recover her. (*Plutarch's Life of Alcibiades.*) It is quite certain that the practice of requiring the party to submit his case to the magistrate had the effect to limit, in some degree, the instances of divorce, although the law was not specific as to the causes which would justify the divorce, yet the parties had to institute a regular action before the court, and the magistrate was not apt to give judgment divorcing the parties if they could be reconciled, nor for a trivial cause. The result was that the Greeks were comparatively exemplary in their domestic relations. (2 *Kent's Com.* 102.)

§ 662. Among the ancient Romans the liberty of divorce was allowed to an almost unlimited extent. The maxim of the civil law was that either party might renounce the marriage union at pleasure, and, as may well be inferred, this facility for separation tended to destroy all mutual confidence, and to inflame every trifling dispute. Divorces were far the most numerous in the most polished ages of the Roman republic; they were very seldom in its early history, and it has been asserted that, although the twelve tables gave to the husband the freedom of divorce, yet the republic had existed five hundred years when the first instance of a divorce occurred. (2 *Kent's Com.* 103.) It was enacted by Romulus that no wife could leave her husband under any circumstances, but the husband had the power to divorce his wife, in case of her poisoning his children, or counterfeiting his keys, or being guilty of adultery. But if on any other occasion he put her away, she was to have one moiety of his goods, and the other half was to be consecrated to Ceres; and whoever put away his wife was to make an atonement to the gods of the earth. (*Plutarch's Life of Romulus.*) One P. Servilius, or Carvilius Spurius, was the first of the Romans that ever put away his wife, and he was impelled to do so, not because he did not love and respect her, but because of her barrenness, and he had been obliged by the censors to take an oath that he would give children to the republic. The women among the Romans came at length to divorce their husbands, as appears from Juvenal (*sat.* 9), and Martial (*lib.* 10, *ep.* 41), as indeed the marriage might be renounced at the pleasure of either

party, and so wanton and extreme was the abuse of this liberty of divorce that it was held up to public scorn and indignation by the Roman philosophers, poets and satirists. (*Seneca de Benef. III. 16. Martial, lib. 9. Juvenal, sat. 6, v. 228.*) The Emperor Augustus undertook to put some restraint upon the facility of divorce, but the check was overpowered by the influence and corruption of manners. Voluntary divorces were abolished by one of the novels of Justinian, but they were afterward revived by another novel of the Emperor Justin. In the novel restoring the unlimited freedom of divorce, the reasons for it are assigned; and while it was admitted that nothing ought to be held so sacred in civil society as marriage, it was declared that the hatred, misery and crimes which often flowed from indissoluble connections required, as a necessary remedy, the restoration of the old law, by which marriage was dissolved by mutual will and consent. (2 *Kent's Com.* 103, *citing Nov.* 140.) And it is understood that this liberty of divorce continued in the Byzantine or Eastern empire until it was finally subdued by the power and influence of Christianity.

Says Mr. Bishop: "Tracing the Roman law down from these early times, we find that, during all those ages in which its light is distinctly discernible, it allowed greater or less latitude of divorce; and the doctrine of indissolubility was ingrafted on the law, not by the wise men who, at any time, swayed the civil affairs of Rome, but by the Roman church, as a religious tenet. This doctrine is believed to have been first made a general tenet of the church by the council of Trent in the year 1653. It never was accepted by the Greek or Eastern church." (1 *Bish. on Mar. and Div.* § 24.) However this may be, the Christian sentiment of the present day is most decidedly in favor of the stability of the marriage union; and, while the policy that the marriage contract is an indissoluble contract in all cases has little sympathy, the opinion is universally prevalent that the parties should never be divorced, except in those extreme cases where the happiness of the husband and wife is entirely destroyed and the legitimate ends of matrimony wholly fail.

§ 663. In France, during the revolution of 1789, an unlimited power was given to the civil tribunals to dissolve marriages, when ever applications were made, founded upon the mutual consent of parties or at the mere pleasure of either party, on a month's notice, upon the ground of alleged incompatibility of temper. A

writer on the subject remarks that, fortunately for that country, perhaps for mankind, this system was not permitted to endure sufficiently long to make the full experiment of moral degradation to which a nation, once the most polished and refined, could be reduced by the existence of a license for almost promiscuous concubinage; and Mr. Burke, in one of his letters on the Regicide Peace, has shown the frightful extent to which divorces were carried under that system. The number of divorces in the city of Paris alone, in the first three months of the year 1793, was nearly five times as great as the whole number of divorces or judicial separations granted in England in the course of an hundred years.

When the Code Napoleon came to be adopted, the subject of divorce was placed upon nearly the same footing as it stands at this day in the State of New York. A dissolution of the marriage for the cause of adultery was thereby allowed. But after the restoration of the Bourbon dynasty, it was deemed expedient to depart from the system of indulgence afforded by the Code Napoleon; and by a law of the 8th of May, 1816, divorce was abolished, and a judicial sentence of separation from bed and board only was allowed, for any definite cause. In France, therefore, after the experiment was tried, they went back to what they deemed the soundest and best policy in regard to public morals and the sanctity of the marriage contract, which was held to be indissoluble except by death. Thus the law stood there when the late Vice-Chancellor McCoun delivered his opinion in a case pending in the late court of chancery of the State of New York, in 1841, from which this sketch is taken, and such is the law there at the present day. (*Vide Hanks v. Hanks*, 3 *Edw. Ch. R.* 469, 470, 471.) Ineffectual attempts were made in 1831 and 1832 to repeal the law of May 8, 1816, and there is therefore at present no divorce *a vinculo matrimonii* in France.

§ 664. In Prussia, the laws respecting divorce are the same that were enacted in the reign of Frederick the Great, and as he was no friend of married life, he was instrumental in framing a code which established a facility of divorce greatly beyond any precedent in modern Europe. By this code, incurable impotency, whether from causes before or after marriage, madness of one year's duration, inexcusable desertion, drunkenness, or other disorder of long standing, ineradicable repugnance, and the like, are causes justifying an absolute divorce, and the complainant in such cases has little

or no difficulty in procuring the decree of the court; and divorces are allowed for many causes fatal to the stability and sanctity of the marriage contract. But in modern Europe, in those countries where the Roman Catholic religion prevails as the national religion, divorces are not generally allowed, for the reason that, by the Roman church, marriage is considered a sacrament, and held to be indissoluble during the life of the parties; though this is not the case in the Greek or Protestant churches; and in Austria divorces between Protestants may be had, not only for several substantial causes, but at the request of both parties, on the ground of *unconquerable aversion*. (2 *Kent's Com.* 104, note a.) By the Dutch law, the only causes for an absolute divorce are adultery and malicious desertion. (*Voet de Divontis et Repudis*, § 5, lib. 24, tit. 2.)

§ 665. The subject of divorce in England, until recently, was governed by the common law, which considers marriage as indissoluble, and its rights inalienable, except by the authority of the legislature or by the sentence of the ecclesiastical court, the former jurisdiction alone having the power of dissolving marriage, and the authority of the latter extending no farther than to divorce *a mensa et thoro*. From a very early period in that country, divorce *a vinculo matrimonii* was not allowed for any cause without an act of parliament, but for certain causes a divorce *a mensa et thoro* was allowed, which did not authorize either party to marry again. In the reign of Elizabeth, it would seem, divorces *a vinculo* were sometimes allowed for adultery; but in a case in the forty-fourth year of her reign the rule was changed, and it was held in the star chamber that adultery was only a cause of divorce *a mensa et thoro*; and the Archbishop of Canterbury declared that it had been so settled before him, on appeal; by many divines and civilians. (*Rye v. Foljamb*, *Moore's R.* 683. *S. C.* 3 *Salk. R.* 138.) No reason seems to have been assigned for this change of opinion; perhaps it arose from an apprehension that the crime of adultery would become more frequent if, when committed by either party, it was admitted to be a sufficient cause for the dissolution of the marriage.

In 1669 Lord de Roos instituted proceedings in the spiritual court, and procured a divorce *a mensa et thoro*, on the ground of the adultery of Lady de Roos, and then presented his petition to parliament to have the marriage absolutely dissolved, and an act was passed

granting him liberty to marry again ; and this is said to be the first case in which application was ever made to the English parliament for a special act of divorce, and the practice was very seldom resorted to for many years afterward, except in cases of adultery. Says Mr. Macqueen : “ On a retrospect of one hundred and seventy years, since the establishment of the system of parliamentary divorce *a vinculo*, I find no case in which that remedy has been awarded or sought without a charge of adultery. There is no example of a bill of divorce for malicious desertion, although, in the other Protestant countries of Europe, that offense, properly established, is considered a scriptural ground of divorce *a vinculo matrimonii*.

* * It is not undeserving of attention that the argument of Bishop Cozens, in Lord de Roos’s case, was not limited to adultery, but included within its range this crime of malicious desertion, by which, as well as by adultery, he appears to have contended that the nuptial bond was rescinded. * * * What might be the result of such an application, strongly supported by evidence of willful and long continued desertion and abandonment, must be matter of conjecture, or, at least, of very doubtful speculation ; the discretion of parliament being unfettered by precedents and open to a free consideration of the special circumstances of every new case.” (*Macqueen, H. L. Pract.* 473, 474.) But, in the year 1857, an act was passed by the English parliament, essentially modifying the practice in respect to divorce. This act retains substantially the old rule respecting divorces *a mensa et thoro* in cases of adultery by the court, calling them judicial separations ; and, in place of the old parliamentary practice, it provides that “ it shall be lawful for any husband to present a petition to the said court, praying that his marriage may be dissolved, on the ground that his wife has, since the celebration thereof, been guilty of adultery ; and it shall be lawful for any wife to present a petition to the said court, praying that her marriage may be dissolved, on the ground that, since the celebration thereof, her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as, without adultery, would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion without reasonable excuse for two years or upward ; * * * provided that, for the purposes of this act, incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his

wife were dead, he could not lawfully contract marriage, by reason of her being within the prohibited degrees of consanguinity or affinity; and bigamy shall be taken to mean marriage of any person, being married, to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere." (20, 21 *Vict. ch.* 85.) It will be observed that the simple adultery of the wife is cause for an absolute divorce, while that of the husband is not; the reason of the distinction being, probably, not because the husband's adultery is a less grave offense against the marriage than the adultery of the wife, but because the violation of the marriage vow on the part of the wife may be much more mischievous in its effect and may impose on the marriage a spurious issue.

Lords Thurlow, Loughborough, Granville and other statesmen of England, expressed a strong desire to have the subject of divorce, *propter adulteriam*, submitted to the disposition of some regular judicial tribunal, where the crime and the provocation to commit it could be carefully balanced and investigated with the temper, deliberation and caution that ought to accompany such a deliberation; but the practice was never adopted there until 1858, when the statute of 20 and 21 Victoria went into operation. By this act a new tribunal, called the court for divorce and matrimonial causes, has been established, and the jurisdiction of the ecclesiastical courts has been entirely superseded in all matters for divorce.

By the law of Scotland, an absolute divorce is granted in cases of adultery and willful desertion by either party; and divorces *a mensa et thoro* are granted in cases of gross abuse and the like. (*Bell's Principles of the Law of Scotland*, 419, 420.)

§ 666. The history of the subject of divorce in this country is not without interest. It may be remarked that the matrimonial law of England is the common law of this country, except in America we have no matrimonial courts, and it is therefore difficult to procure the dissolution of the marriage contract without legislation upon the subject.

The history of the early policy concerning divorces in the State of New York has been judicially declared. When New York became a province of England, it was for some years ruled by a governor, or a governor and council; and during that period the governor, either alone or in conjunction with the council, seems to have exercised all magistracy, executive, legislative and judicial.

During that period one of the governors, Lovelace, granted four divorces, of which one was in 1670 and the other three in 1672. These are the only instances of divorce which appear to have taken place in the colony during the long period in which New York was a province of England. In 1683 the people were admitted to a participation of the legislative power, and from that time laws were enacted by the colonial legislature. The colony never had any court possessing jurisdiction of matrimonial causes, or power to grant divorces. No statute defining causes of divorce, or authorizing divorce, in any case whatever, was ever enacted by the legislature of the colony. Some special applications for divorces were made to the colonial legislature, but all such applications were refused. The governor of the colony, with the consent of the council, had power to establish courts of justice, and all the courts of the colony derived their origin from this source of authority. But no court having cognizance of matrimonial causes or divorces was ever established in the colony; no court of the colony ever exercised any such jurisdiction, and no law concerning divorce was ever enacted by the colonial legislature. The four divorces granted by Governor Lovelace must be regarded as extraordinary acts of power, by a chief magistrate who possessed very great and indefinite authority. They were the acts of one governor; they stand alone in the history and practice of the colony, and they afford no proof of any law of the colony authorizing divorces. From the best information that can be obtained from the records or otherwise, it appears that no divorce took place in the colony of New York during more than one hundred years preceding the time when it became a state, and that the only divorces which ever took place in the colony, were the four granted by Governor Lovelace, in 1670 and 1672. Thus, it appears that the law of England concerning divorces and matrimonial causes, was never adopted in the colony of New York. It was not adopted in fact or in practice, and it was never the law of the colony.

When the colony became a state in 1777, the law of the colony was adopted as the law of the state; and during more than ten years after the colony became a state there was no law authorizing a divorce in any case whatever. On the 30th day of March, 1787, the legislature passed a statute entitled "An act directing a mode of trial, and allowing of divorces in cases of adultery." This was the first law of the state authorizing a divorce, and it was confined

to the case of adultery. It continued to be the only law until the 9th day of April, 1813, when the legislature passed an act which gave the wife the right to obtain a divorce from her husband when he had been guilty of cruel and inhuman treatment toward her, or such conduct as rendered it unsafe and improper that she should cohabit with him; or where he had abandoned her and neglected to provide for her; and the provisions of this act were extended by statute on the 10th April, 1824, to husbands against their wives; and these statutes continued in force until the Revised Statutes of 1830 took effect. Upon this history, and upon a review of the legislation upon the subject, the late court of chancery, in 1825, refused a divorce in case of impotence; and the chancellor, in giving his opinion, said: "The cause for which this court is now asked to dissolve a marriage is corporal impotence on the part of the husband. This fact is not a cause of divorce by our statutes; and it is impossible to yield to this suit without adopting the law of England, or of some other country, concerning divorces, as the law of this state. If a divorce can be granted for this cause, the whole catalogue of causes allowed by the laws of England may be equally adopted; the acts of the legislature and the policy of the state respecting divorces would be superseded by the doctrines of a foreign code; and a power hitherto unknown in this state would be exercised. The corporal impotence of the husband is a cause of divorce in England, and by the laws of most countries; but it is not a cause of divorce by the laws of this state. This suit must, therefore, be dismissed." (*Burtis v. Burtis*, *Hop. Ch. R.* 557.) It may be stated here that by the Revised Statutes now in force in the state, physical incapacity is made a ground of divorce, if suit is brought within two years after the marriage. (2 *Rev. Stat. part. 2, ch. 8, tit. 1, § 20.* 2 *Stat. at Large*, 148.) But it is proposed to give the causes for divorce in the State of New York in another place.

§ 667. In the State of South Carolina, to her unfading honor, as has been claimed, "a divorce has not been granted since the Revolution." (*Head v. Head*, 2 *Kelly's R.* 191.) Judge Nott, in delivering the opinion of the court in a case, very singularly observed: "In this country, where divorces are not allowed for any cause whatever, we sometimes see men of excellent character unfortunate in their marriages, and virtuous women abandoned or driven away houseless by their husbands, who would be doomed

to celibacy and solitude if they did not form connections which the law does not allow, and who make excellent husbands and virtuous wives still. Yet they are considered as living in adultery, because a rigorous and unyielding law from motives of policy alone, has ordained it so." (*Cusack v. White*, 2 *Mill's R.* 279, 292.)

Judge O'Neill, while expressing himself in laudatory terms of the legislation of the state upon the subject, remarked: "The most distressing cases, justifying divorce even upon Scriptural grounds, have been again and again presented to the legislature, and they have uniformly refused to annul the marriage tie. They have nobly adhered to the injunction, 'Those whom God hath joined together let no man put asunder.' The working of this stern policy has been to the good of the people and the state in every respect." (*McCarty v. McCarty*, 2 *Strob. R.* 6, 11.) And Chancellor Durgan declared: "The policy of this state has ever been against divorces. It is one of her boasts that no divorce has ever been granted in South Carolina." (*Hair v. Hair*, 10 *Rich. Eq. R.* 163, 164.) It is perceived, therefore, that in South Carolina they have no history upon the subject of divorce, because no divorce is ever granted; but this state is an exception, and perhaps the declaration of one of her judges is the result of the policy, when he said: "All marriages, almost, are entered into on one of two considerations, love or interest, and the court is induced to believe the latter is the foundation of most of them." (*Devall v. Devall*, 4 *Des. R.* 79.) But all the other states have a history of more or less duration upon this important subject of divorce.

§ 668. In New Hampshire, Parker, Ch. J., in 1838, gave a history of the laws of divorce in that state, thus: "Prior to the revolution divorces are supposed uniformly to have been granted by the legislature, as they are sometimes granted by parliament in England. No law is found giving the ordinary courts of judicature any power upon the subject. They were so granted afterward, and prior to the adoption of the constitution of 1783. In the edition of the laws printed in 1780, page 115, is an act to dissolve the marriage between Robert Rogers, and Elizabeth his wife, passed March 4, 1778. And during the existence of the provincial government, that part of the jurisdiction of the ecclesiastical courts relating to the probate of wills and settlement of estates was exercised by judges of probate, with an appeal to the governor and council, as the supreme court of probate. (*Prov. Laws*, 103-106.)

"Upon the adoption of the constitution, in 1783, it was deemed expedient to make a different provision in this respect, and the clause referred to in the argument was inserted, providing that all causes of marriage, divorce and alimony, and all appeals from the respective judges of probate, shall be heard and tried by the superior court, until the legislature shall by law make other provision.

"It is evident, from this view of the matter, that this clause of the constitution was not intended to create any new rules in relation to marriage, or its dissolution, or the maintenance of married women. It provided for a mere transfer of the jurisdiction which had existed in the assembly and the governor and council, leaving the legislature to make such provision upon the subject as should afterward be deemed expedient.

"In 1791, the legislature passed an act specifying the causes for which divorces might be granted. * * * This act is still in force, and has ever since been regarded as a legislation upon the whole subject, and not as in aid of any practice such as is adopted in the English ecclesiastical courts. It embraces nearly all of the laws of divorce from bed and board in England, and authorizes, in all the cases specified, a divorce from the bans of matrimony." (*Parsons v. Parsons*, 9 *N. H. R.* 309, 318, 319.) In 1839, an act was passed extending the list of causes for divorce to that of desertion and refusal to cohabit for the space of three years, and thus the law stands at the present day.

§ 669. In the State of North Carolina, the first law which gave authority to the courts to take cognizance of the subject of divorce was passed in 1814, and declared the causes for divorce from the bans of matrimony to be natural impotence, or that either party has separated him or herself from the other, and is living in adultery, and a divorce from bed and board might be decreed when the husband maliciously turns his wife out of doors, endangers her life by cruel treatment, or offers intolerable indignities to her person. (*Laws of 1814, ch. 5. And vide Dickinson v. Dickinson*, 3 *Murph. R.* 327.) Before the passage of this act of 1814, divorces in North Carolina could be only granted by the legislature, and it was competent for the legislature to divorce either from bed and board, or from the bans of matrimony, at discretion, without regard to the law as it then stood. But in that year the legislature transferred full jurisdiction to the courts in cases of impotency and adultery to divorce either from bed and board, or from the bans of

matrimony, at their discretion. (*Collier v. Collier*, 1 Dev. Eq. R. 152.)

These brief sketches, showing the sources of authority and the early practice in cases of divorce, are derived from the opinions of judges, who have taken the trouble to examine the records and bring out the history of the subject; and very likely other judges have taken a similar interest in other States, and the result of their examinations may be found in the published reports of the states; but it is not thought to be of sufficient importance to justify any further inquiry in this place. As has been before suggested, all of the states, with the exception of South Carolina, have a system of divorce, and, for causes more or less numerous, the marriage relation may be dissolved.

§ 670. It might be interesting to trace the history of opinion upon this subject of divorce, and the modifying effect which the changing conditions of society have produced in the opinions of good men in respect to the real nature and object of the marriage union, and the policy of a system which contemplates its dissolution in certain extreme cases during the lives of the parties; but it is not consistent with the plan of this work to occupy any considerable space with this matter. The prevailing opinion upon the subject at the present day may be summarily given: "The rendering of the contract of marriage indissoluble is running into the opposite extreme from that of permitting divorces at the pleasure of the parties. There are many persons who, on the idea that the marriage contract cannot be vacated for any misconduct, will not behave with the propriety they would if the continuance of the contract were dependent on their exertions to make themselves agreeable to the persons with whom they are connected. It is a great hardship that a person who has been unfortunate in forming a matrimonial connection must be forever precluded from any possibility of extricating himself from such a misfortune, and be shut out from enjoying the best pleasures of life. This consideration, instead of adding to the happiness of the connection, must frighten persons from entering into it. It is, therefore, the best policy to admit a dissolution of the contract when it is evident that the parties cannot derive from it the benefits for which it was instituted; and when, instead, of being a source of the highest pleasure and most enduring felicity, it becomes the source of the deepest woe and misery." (1 *Swift's System*, 191.)

"The idea that, according to any just view, whenever parties have come together in marriage, they have thereby placed themselves so far in each other's power for life as to be incapable of freeing themselves by any act of the law, though the ends of their union are all frustrated, though one of them is unwilling to discharge the duties undertaken, though every hope of its ministering to the well-being of the parties is obliterated, surely can have place only in a perverted understanding. True, indeed, is it that this union is intended to be for life, that only in the most extreme circumstances should it be dissolved; but the very fact of its sacred nature, too sacred to be made matter of temporary arrangement, is the strong reason why, when it ceases to have any thing worthy to be called sacred about it, when an erring one has trampled it in the mud of his corruption by his polluted feet, the law should cease to call it sacred, and pronounce it profaned and dissolved. The idea of promoting in the community reverence for marriage by holding that to be marriage from which all disgusting things do flow, by receiving as too sacred to be molested the relation which breeds corruption in the souls of the parties, adulteries in the community, unnatural developments of wickedness in children, sorrow in the hearts of multitudes made by God to be happy, blasphemies in the temple of matrimonial purity, is too preposterous, too absurd, to be reasoned against; too monstrous to be credited as a fact of human legislation, did not testimony not to be rejected prove its existence." (1 *Bishop on Marriage and Divorce*, § 46.)

But there is a general concurrence of opinion at the present day that the objects of the matrimonial union are best subserved by a legal policy which provides, in certain aggravated cases, for its dissolution, although the opinions of men very naturally differ as to the extent to which the latitude of divorce should be carried. An opinion adverse to a divorce under any circumstances is an exception to the rule; and it is doubtful, even in South Carolina, whether the prevailing sentiment is not opposed to the policy which forbids all divorces, although as yet no system of divorce has been inaugurated in that state. The divergency of opinion among thoughtful men is in respect to the facilities for obtaining a divorce, and not in respect to the propriety of granting divorces at all.

CHAPTER XLII.

THE DIFFERENT KINDS OF DIVORCE—THE DIVORCE FROM THE BONDS OF MATRIMONY—CAUSES FOR AN ABSOLUTE DIVORCE—THE DIVORCE FROM BED AND BOARD—GROUNDS OF SUCH DIVORCE.

§ 671. THERE are two kinds of divorce usually recognized in England and the United States: an absolute divorce from the bond of matrimony, or, in Latin, a divorce *a vinculo matrimonii*; and a divorce simply from bed and board, or, as the Latin expresses it, a divorce *a mensa et thoro*. The divorce *a vinculo matrimonii* is a complete dissolution of the bond of matrimony, and puts an end to the marriage relation. The divorce *a mensa et thoro*, is not a dissolution of the marriage contract, but is a mere judicial separation of the parties, while the matrimonial relation still continues to exist. In some of the states all divorces are absolute and completely terminate the marriage relation; and *technically* in England they have only the divorce from the bond of matrimony, though they have a judicial separation which has the same force and effect as a divorce *a mensa et thoro*. In a few of the states the divorce may be either absolute or limited, in the discretion of the court, or even at the election of the party applying for it, and sometimes for the same causes, and upon the same state of facts; and in one or two of the states the divorce *a mensa et thoro* is granted as a preliminary to the divorce *a vinculo matrimonii*. As a general rule, however, it may be affirmed that the character of the divorce is determined by statute, leaving no discretion in the tribunal before which the application is made. In those states where the statute authorizes the court to make the separation perpetual or only for a limited period, the courts always hold this is not an arbitrary discretion, but one which should be judiciously exercised. It was said in one case; “although a divorce *a mensa et thoro* may be allowed in some instances to a person who is not entirely impeccable, who may not have been exemplary in all the attentions and stipulated offices assumed in contracting this relation, yet the policy of the law, the interest of the offspring, the tranquillity and happiness of families in general, forbid the dissolution of marriage at the suit of a person to whom default in any of the essential duties of married life can be fairly imputed.” (*Whittington v. Whittington*, 2 Dev. & Bat. R. 64. *Vide also Rutledge v. Rutledge*,

5 *Sneed's R.* 554. *Buckholts v. Buckholts*, 24 *Geo. R.* 238. *Conant v. Conant*, 10 *Cal. R.* 249.) In a case before the late court of chancery in the State of New York, in 1819, where, by the statute concerning divorces, the enlarged discretion was given the court, Chancellor Kent observed: "There is much embarrassment on the ground of policy and public morality, with these partial dissolutions of the matrimonial union. It is throwing the parties back upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife. * * * There are objections to a separation for a precise or limited time, though such decrees have been rendered. It may inspire a constant fear on the one side, and nourish hopes of revenge on the other. It rather appears to me to be the most kind and salutary course to declare the separation perpetual, with a power, however, reserved to the parties to come together under the sanction of the court, whenever they shall find it to be their mutual and voluntary disposition." (*Barrere v. Barrere*, 4 *Johns. Ch. R.* 187, 191.) And in another case before the same learned chancellor, as early as 1815, wherein it appeared that the parties were young, and it was thought possible that a temporary separation would be sufficient for correction and admonition; the chancellor said: "I shall give them an opportunity at a distant period of re-entering into their duties, and of seeking for mutual consolation and happiness in conjugal life." (*Bedell v. Bedell*, 1 *Johns. Ch. R.* 604, 606.)

§ 672. The divorce is sometimes granted by act of the legislature, and, in such cases, no rule can be stated in respect to the causes for which an absolute divorce will be granted. It is generally supposed that unless the fundamental law of the state expressly prohibits legislative divorces, the legislature may grant such divorces in its discretion, although a satisfactory reason is usually given for the divorce, in every case. But the subject of legislative divorces is at present of but little practical interest in the United States, from the fact that jurisdiction is generally given to the courts in all cases of divorce, and in many states constitutional provisions exist prohibiting such divorces. In fact, the courts have occasionally held in those states where there is no express inhibition, that such divorces are an infringement of the provisions of the federal constitution prohibiting the passage of any law impairing the obligation of contracts. In a case in the State of Florida, the supreme court of the state took this view.

Semmes, J., who delivered the opinion of the court, insisted that there was no good reason why this provision of the constitution should be restricted to contracts of a pecuniary nature, and not embrace that of marriage, saying that the contract of marriage was comprehended by the words of the constitution, and that there was no rule of construction that would exclude it, in the absence of any thing to show that it is not within its spirit. (*Ponder v. Graham*, 4 Flor. R. 23.) A similar opinion has been advanced in other cases, but the doctrine is not generally recognized as being sound, and yet the practice of dissolving the marriage relation by acts of the legislature is so little resorted to in the United States, that it is not thought necessary to refer to the discussions which have been had, and the doctrines declared in respect to that species of divorce.

§ 673. The causes for an absolute divorce are generally prescribed by statute, and there is a wide difference in the statutes of the several states upon the subject. The adultery of the party, however, is a ground of divorce *a vinculo matrimonii* in all, or nearly all, of the states; perhaps in all of the states, with the exception of South Carolina, where they have no divorces at all, either by the sentence of a court of justice, or by act of the legislature. Indeed no offense is regarded so repugnant to the marriage relation as that of adultery, and hence that is a cause for an absolute divorce in all countries where divorces are granted for any cause whatever. Adultery consists in the carnal connection of one of the married parties with any other person than him or her to whom he or she is married. The offense can be committed only by a married person, although the associate in the act may be either married or single. The law formerly treated adultery as an offense against society, but recently it is treated as an offense against the moral law, for which the offender is accountable to the injured party. The public sentiment is generally against treating it as a criminal offense, although in some of the states it is punishable by fine and imprisonment. In all countries the offense of incontinence by the man is differently considered from the same offense in the woman, although it is very difficult in principle to discover the distinction. In England, it is only the husband, ordinarily, that can have an absolute divorce for the incontinence of the wife, but in France and in all of the United States, the adultery of either party is a ground of absolute divorce, on the

petition of the party aggrieved; and in England, if the adultery of the husband is incestuous, or coupled with bigamy or rape, the wife may have her absolute divorce. The adultery in every case must be voluntary, for if the connection were the result of mistake, or force, it is not the foundation for a divorce; that is if the wife were ravished, or if the husband should have carnal knowledge of a woman honestly believing her to be his wife, the offense is not committed so as to justify a divorce, or if the party were insane at the time of the connection. The carnal act under such circumstances, would not constitute adultery. (*Nichols v. Nichols*, 31 *Vt. R.* 328. *Broadstreet v. Broadstreet*, 7 *Mass. R.* 474.) But no pretended religious opinion favoring adultery can be urged in defense of the act. (*D'Aquilar v. D'Aquilar*, 1 *Hag. Ec. R.* 773. 1 *Bish. Mar. and Div.* § 713.)

§ 674. As a general rule a person sentenced to imprisonment in a state prison or penitentiary for life, is deemed civilly dead, and therefore such sentence, in case of a married man or woman, *ipso facto* dissolves the marriage union. And in several of the states, the conviction and sentence to the state prison for a specified number of years, less than for life, is cause for an absolute divorce. Thus, in the States of Vermont, Michigan, Wisconsin, Nevada, Nebraska and others, a conviction of felony and sentence to the state prison for the term of three years or more, is made a ground for divorce *a vinculo matrimonii*; and in some of the states, as in Illinois, Kentucky, Missouri, Minnesota and Oregon, the simple conviction of a felony or infamous crime is cause for a divorce; and in others of the states, as in Connecticut, the conviction of the offense of bestiality, or any other infamous crime involving a violation of conjugal duty and punishable by imprisonment in a state prison, is deemed a sufficient cause of divorce from the bonds of matrimony. In these cases it has been held that if there should be a discrepancy between the name of the party in the record of conviction and in the proceedings for a divorce, evidence *aliunde* will be admissible to show that both names refer to the same person. (*Utsler v. Utsler*, *Wright's R.* 627.)

§ 675. In many of the states, as in Vermont, Connecticut, New Jersey, Pennsylvania, Illinois and most of the western states, cruelty, or as it is sometimes named, "extreme cruelty," "such inhuman treatment as to endanger life," or "cruel and barbarous treatment," is a valid ground for an absolute divorce. When this

is made a cause of divorce, there is often difficulty in determining whether the act complained of amounts to cruelty within the meaning of the statute, and there has been no small amount of litigation as to the definition and nature of *legal* cruelty. But in cases where the divorce is from the bond of matrimony for this cause, it is generally understood that *legal* cruelty is that which may endanger the life or health of the party. Lord Stowell, in his master opinion, pronounced eighty years ago, is often quoted as a leading authority upon the subject; and he said, "what merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offenses in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty which the law can relieve. Under such misconduct of either of the parties, for it may exist on one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and, if this cannot be done, both must suffer in silence. * * * In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the court has granted a divorce without proof given of a *reasonable apprehension* of bodily hurt." (*Evans v. Evans*, 1 *Hag. Con. R.* 35.)

In England, at the time this opinion was pronounced, cruelty was cause for a divorce only from bed and board, but the definition of legal cruelty laid down by the eminent judge, is generally recognized as authority in those states where cruelty is a ground for an absolute divorce. The general doctrine would seem to be that there must be either actual violence committed, attended with danger to life, limb or health, or there must be a reasonable apprehension of such violence. (*Vide Shaw v. Shaw*, 17 *Conn.*

R. 189. *Butler v. Butler*, 1 *Parson's R.* 329, 334. *Sharman v. Sharman*, 18 *Texas R.* 521, 525. *Mahone v. Mahone*, 19 *Cal. R.* 626. *Morris v. Morris*, 14 *ib.* 76. *Wand v. Wand*, *Ib.* 512. *Finley v. Finley*, 9 *Dana's R.* 52. *Thornberry v. Thornberry*, 2 *J. J. Marsh. R.* 322.) In the statute of Illinois the words are, "and for extreme and repeated cruelty, and habitual drunkenness for the space of two years;" the courts hold that the two^o years specified do not apply when the case is one of cruelty. (*Harman v. Harman*, 16 *Ill. R.* 85.)

As a general rule, one act of cruelty, unless a very aggravated one, will not suffice to authorize a divorce. The acts must be persistent, unless they are such as to lead to the presumption that they will be repeated. (*Mahone v. Mahone*, 19 *Cal. R.* 626, 628. *Richards v. Richards*, 1 *Grant's Cases*, 389. *Graecen v. Graecen*, 1 *Green's Ch. R.* 459. *Finley v. Finley*, 9 *Dana's R.* 53. *Lauber v. Mash*, 15 *La. An. R.* 593. *Doyle v. Doyle*, 26 *Mo. R.* 545.) As has been intimated, *actual* violence is not always necessary. By the statute of Iowa, when the husband "is guilty of such inhuman treatment as to endanger the life of his wife," the court held that, as a specific cause of divorce, this clause is the definition of that degree of cruelty which entitles the party to a divorce; "but threats of violence, when there is danger of harm—that is, of harm or injury to the life of the party, are sufficient." (*Beebe v. Beebe*, 10 *Iowa R.* 133, 135, 139. *Carathurs v. Carathurs*, 13 *ib.* 266.)

Usually in cases of applications for divorce on the ground of cruelty, the complaint proceeds from the wife, and yet the law of most of the states where cruelty is a cause for an absolute divorce, authorizes the divorce as well on the application of the husband as of the wife. (*Beebe v. Beebe*, *supra*.)

§ 676. So also in many of the states abandonment and desertion is ground for a divorce *a vinculo matrimonii*, although the duration of such abandonment and desertion in order to justify the divorce, is varied by the statutes authorizing the same.

The civil and canon law, according to Godolphin, allow of divorce after a *long absence*, but are not agreed touching the time of that absence: for in one place it is often two years, in another three years, in another four. Others hold that the civil law requires five years' absence before there may be a divorce on that account. "But the truth is," he affirms, "no absence, be it for any time whatever, doth properly cause a divorce in law. Indeed, seven

years' absence, without any tidings or intelligence of or from the absent party, as to indemnify the woman from the penalty of polygamy, if in any case she marry again. Also the canon law hath decreed, that if the wife refuse to dwell with her Christian husband, he may lawfully leave her." (*Godolph. Ab.* 194.) And there are provisions, as we have seen, in the statutes of several of the United States; sanctioning the marriage of a person whose husband or wife shall have absented himself or herself for a specified number of years, without being known to such person to be living (*ante* § 642); but in these cases such absence is no cause for divorce, and such absence does not come under the head of abandonment and desertion where that is declared to be a cause for divorce.

The offense of abandonment and desertion, as a ground of divorce, although differently expressed in the statutes of those states where it is made a ground of divorce, is generally understood to be a willful and malicious desertion of the party, intending thereby to renounce the marriage relation. The period of desertion to justify the divorce is usually fixed by the statute, and differs in many of the states. Thus, by the laws of Vermont there must be "willful desertion for three consecutive years." (*Gen. Stat.* 1863, *ch.* 70, § 20.) In New Hampshire the provision is "when either party, without sufficient cause, and without the consent of the other, shall have abandoned such other, and refused for three years to cohabit with such other." (*Vide Payson v. Payson*, 34 *N. H. R.* 518.) In Maine willful desertion for five years is a ground of divorce. (*Fellows v. Fellows*, 31 *Maine R.* 342.) In Connecticut there must be "seven years' absence, not heard of." (*Gen. Stat.* 1866, *tit.* 13, *ch.* 3, § 32.) In New Jersey it is "willful, continued and obstinate desertion for the term of five years." (*Elm. Dig.* p. 206, §§ 3, 4, 8.) In Pennsylvania the language is "willful and malicious desertion and absence from the habitation of the other, without a reasonable cause, for and during the term and space of two years." (*Laws of 1815.* 6 *Smith's Laws*, 286. *Dunlop's Laws*, p. 319.) In Ohio, when either of the parties is willfully absent for three years, a divorce may be granted. In Indiana, willful desertion for one year is sufficient. (2 *Rev. Stat. of 1862*, *ch.* 6, § 7.) In Illinois, where the party "has willfully deserted and absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years," an absolute

divorce may be granted. (1 *Gen. Stat. of 1858*, p. 150, § 1.) And the law is substantially the same in Michigan. (*Comp. Stat. 1857*, ch. 108, § 6.) In Missouri, a divorce *a vinculo matrimonii* will be granted when the husband or wife absents himself or herself "without reasonable cause for the space of one year." (*Gen. Stat. of 1865*, ch. 114, § 1.) The law is the same in Minnesota. (*Gen. Stat. of 1858*, ch. 53.) In Iowa the desertion must be two years. (*Laws of 1860*, p. 429, § 2534.) In the new State of Nevada, the law is substantially the same. (*Laws of 1861*, ch. 33, § 22.) And the law is the same in the new State of Nebraska. (*Rev. Stat. of 1866*, ch. 16, § 6.) In Oregon, it is "willful desertion for the period of three years." (*Gen. Stat. 1864*, ch. 5, § 491.) The laws of California and Mississippi are similar. (*Comp. Stat. Cal. 1853*, ch. 116. *Rev. Stat. of Miss. p. 333*, art. 11.) In Kentucky the court of chancery may decree an absolute divorce for the abandonment and separation by one party from the other, for one year, upon the application, of course, of the party not in fault. (2 *Rev. Stat. p. 17*, art. 3, § 1.) In Tennessee the words of the statute are "willful and malicious desertion or absence by the husband or wife, without a reasonable cause, for the space of two years." (*Vide Stewart v. Stewart*, 2 *Swan's R.* 591. *Rutledge v. Rutledge*, 5 *Sneed's R.* 554.) In Georgia, it is "willful and continued desertion for the term of three years." (*Vide Wood v. Wood*, 29 *Geo. R.* 281.) And in Florida the provision is "for willful, obstinate and continued desertion, by either party, for the term of a year." (*Thomp. Dig.* 223.)

The provisions given are supposed to be in accordance with the statutes of the several states now in force; but as the statutes are occasionally changed, the practitioner will be careful to examine the statutes of the state in which the application is made.

§ 677. It would seem that the legal meaning of these words "desertion" and "abandonment" was so apparent that there should be no question in regard to it; and yet there has been a vast deal of litigation involving simply the interpretation to be given to the various phrases made use of in the statutes. In *theory*, the courts hold that the *assent* of the party to the separation and absence of the other will prevent the divorce, although such assent may be revoked when the absence may amount to desertion (*Butler v. Butler*, 1 *Parson's R.* 329); or, if the husband should make a provision for the support of his wife away from him, he

cannot claim her absence to be desertion (*Vanleer v. Vanleer*, 13 Penn. R. 211); or, if the husband should decide to leave the country, and his wife should refuse to accompany him, it would not be desertion. (*Bishop v. Bishop*, 30 Penn. R. 412. *And vide Smith v. Smith*, 16 Leg. Int. 356.) In *theory* it is held that the party must actually cease to cohabit, with the *intention* to desert the other party, and the desertion must be, to all intents and purposes, continued the term of time prescribed; but in *practice* the offending party, that is, the *deserter*, often obtains the divorce upon his own application. For instance, the cases are very frequent where the husband in the State of New York, for example, gets at variance with his wife, and wishes to be freed from her, whereupon he abandons her and goes into one of the western states, remains there the requisite time, and then *complains* that his wife has deserted him, and applies for a divorce, and, upon complying *technically* with the practice of the court, he obtains his decree; the fact being all the while that his forsaken and deserted wife would rejoice to follow and cohabit with him, if he would but permit it. To be sure, if all the facts were got before the court, the application would be denied; but, as a general rule, the wife has no notice of the proceedings until the matter is ended and the divorce granted.

§ 678. As a general rule in these cases suggested in the closing paragraphs of the last section, the husband bases his application upon the ground that he has seen fit to emigrate to the new state in order to better his condition, and his wife, not following him, is guilty of desertion. But even if the fact was as he affirms, his wife might not be guilty of desertion within the meaning of the statute. In a case arising under the Vermont statute, Redfield, Ch. J., said: "While we recognize fully the rights of the husband to direct the affairs of his own house, and to determine the place of the abode of the family, and that it is in general the duty of the wife to submit to such determinations, it is still not an entirely arbitrary power which the husband exercises in those matters. He must exercise reason and discretion in regard to them. If there is any ground to conjecture, that the husband requires the wife to reside where her health and her comfort will be jeopardized, or even where she seriously believes such results will follow which will almost of necessity produce this effect, and it is only upon that ground that she separates from him, the court cannot regard her desertion as

continued from mere willfulness." (*Powell v. Powell*, 29 *Vt. R.* 148, 150.) And a similar doctrine has been held by the courts in Pennsylvania and in Wisconsin. (*Bishop v. Bishop*, 30 *Penn. R.* 412. *Gleason v. Gleason*, 4 *Wis. R.* 64. *Vide also Hardenburgh v. Hardenburgh*, 14 *Cal. R.* 654.) If the husband, in good faith, undertakes to change his residence, and there is no good and legal reason why his wife should object to it, and, notwithstanding, she refuses to accompany him and stays behind, the rule would be different, and it might be regarded as a case of desertion. (*Vide Walker v. Leighton*, 11 *Foster's R.* 111.)

It seems there may be cases of literal abandonment of the husband by the wife, and yet not amount to *desertion*, so as to justify a divorce. For example, where the absence of the wife is occasioned by the ill-treatment or neglect of the husband, and *vice versa*. (*Gray v. Gray*, 15 *Ala. R.* 779, 784, 785.) Upon this point, it was said in a Maryland case, "if a man fails to supply his wife with such necessaries and comforts of life as are within his reach, and by cruelty compels her to quit him and seek shelter and protection elsewhere, we should have no hesitation in saying it would be as much abandonment of her by him as if he had deserted her and gone away himself." (*Levering v. Levering*, 16 *Md. R.* 213, 219.) It is observed here that the court intimates that the wife might be divorced on account of the abandonment by her husband; and the same doctrine has been maintained in Connecticut and North Carolina. (*Vide Reeve's Dom. Rel.* 3d ed. 327. *Wood v. Wood*, 5 *Ired. R.* 674.)

Willful neglect without desertion in the State of California is a ground of divorce. (*Washburn v. Washburn*, 9 *Cal. R.* 475.)

§ 679. In several of the states *habitual drunkenness* for a specified time is a ground of divorce *a vinculo matrimonii*. Thus, in the State of Connecticut, the superior court may grant an absolute divorce on the ground of the "habitual intemperance" of the party, without specifying the length of time during which the habit must exist in order to constitute the offense (*Gen. Stat.* 1866, *tit.* 13, *ch.* 3, § 32); and, by the statutes of Nebraska and Nevada, it is only necessary to show that the party is an "habitual drunkard," regardless of the duration of the habit, except that it must, of course, exist long enough to become "habitual" or confirmed. (*Rev. Stat. Nebraska*, 1866, *ch.* 16, § 6. *Laws of Nevada of 1861*, *ch.* 33, § 22.)

In the State of Iowa, "habitual drunkenness" is the cause stated (*Rev. Laws of 1860, p. 429*); and the provisions of the Indiana statute are, in substance, the same. (2 *Rev. Stat. 1862, ch. 6, § 7*.)

In Minnesota and Missouri, the provision is, the "habitual drunkenness" of the party for one year next preceding the bringing of the action. (*Gen. Laws of Minn. of 1858, ch. 53, § 7. Gen. Stat. of Mo. of 1865, ch. 114, § 1.*)

In the State of Illinois the ground is, "habitual drunkenness for the space of two years." (1 *Gen. Stat. of 1858, p. 150, § 1*); and, in Oregon, the provision is, "habitual gross drunkenness, contracted since marriage, and continuing for two years prior to the commencement of the suit." (*Gen. Stat. 1864, ch. 5, § 491.*)

In the State of Kentucky the wife is entitled to a divorce *a vinculo matrimonii* on the ground of "confirmed drunkenness on the part of the husband not less than one year's duration, accompanied with a *wasting of his estate*, and without any suitable provision for the maintenance of his wife and children." (2 *Rev. Stat. p. 17, art. 3, § 1. And vide McKay v. McKay, 18 B. Mon. R. 8.*)

In order to constitute the offense of "habitual drunkenness," within the meaning of the law, it is not necessary that the party be drunk all the time. If there is a fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business, it is "habitual drunkenness," although the person may, at intervals, be in a condition to attend to his business affairs. (*Mahone v. Mahone, 19 Cal. R. 626, 628.*) But there is, in general, little or no danger of the person prematurely regarding his or her spouse as a drunkard, for the last person to learn that a man is a drunkard is himself, and the next to the last person to find it out is his wife.

§ 680. In a few of the states, "personal indignities, rendering life burdensome," is made a ground of divorce *a vinculo matrimonii*. This is the law of Oregon (*Gen. Stat. 1864, ch. 5, § 491*); and in the States of Minnesota and Missouri the law is the same, except the language of the statute is "intolerable indignities." (*Gen. Stat. of Minn. 1858, ch. 53. Gen. Stat. of Mo. 1865, ch. 114, § 1. And vide Chatham v. Chatham, 10 Mo. R. 296.*) In Kentucky the provision is, "habitually behaving toward her by the husband for not less than six months in such an inhuman manner as to indicate a settled aversion to her, and to destroy per-

manently her peace and happiness." (2 *Rev. Stat.* p. 17, art. 3, § 1.) And in Pennsylvania the provision is, where the husband shall have "offered such indignities to her person as to render her condition intolerable, and life burdensome, and thereby force her to withdraw from his house and family." (6 *Smith's Laws*, 286. And *vide Butler v. Butler*, 1 *Pars. R.* 329. *Light v. Light*, 17 *Serg. & Rawle's R.* 273.) In Connecticut the language of the statute is, "such misconduct as permanently destroys the happiness of the petitioner, and defeats the purposes of the marriage relation." (Gen. Stat. 1866, tit. 13, ch. 3, § 32.) In these cases the provision is in favor of the wife as a general rule, pre-supposing that there is no occasion for such relief for the husband; although in some instances the statute makes the offense mutual.

An indignity to the person may be offered without striking the body, or even touching it in a rude and offensive manner. Contumelious words, especially when accompanied with a contemptuous demeanor, toward a person, may amount to an indignity which would be felt by a sensitive mind with far keener anguish than would be inflicted by a blow. (*Vide Cobb v. Cobb*, 2 *Jones' Eq. R.* 392.) It is impossible to lay down any rules that will apply to all cases in determining what indignities are grounds of divorce because they render the condition of the injured party intolerable. The habits and feelings of different persons differ so much that treatment which would produce the deepest distress with one would make but a slight impression upon the feelings of the other. It is obvious, therefore, that each case must be determined according to its own peculiar circumstances. (*Vide Hooper v. Hooper*, 19 *Mo. R.* 355. *Bowers v. Bowers*, *Ib.* 351. *Shell v. Shell*, 2 *Sneed's R.* 716.)

In some states there are other causes for an absolute divorce than those already mentioned, and sometimes the matter is in the discretion of the court. Thus, in Missouri, the pregnancy of the wife before marriage, or the common vagrancy of the husband, is a cause for divorce. (Gen. Stat. 1865, ch. 114, § 1.) In North Carolina, after naming two causes, the statute adds, "or other just cause for divorce, at the discretion of the court." (*Rev. Code of 1855*, ch. 39, §§ 2, 3. *Vide Scroggins v. Scroggins*, 3 *Dev. R.* 535.) And in Illinois the statute enacts that, in addition to the causes specified, courts of chancery in the state "shall have full power and authority to hear and determine all causes for divorce not pro

vided for by any law of this state." (1 *Gen. Stat. of* 1858, p. 151, § 8. *But vide Vignas v. Vignas*, 15 *Ill. R.* 120.) In the State of Maine the statute provides that "a divorce from the bonds of matrimony may be decreed by any justice of the supreme judicial court, when, in the exercise of a sound discretion, he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society." (*Rev. Stat.* 1857, ch. 60, § 2. *And vide Anonymous*, 27 *Maine R.* 563. *Ricker v. Ricker*, 29 *ib.* 281. *Small v. Small*, 31 *ib.* 493. *Motley v. Motley*, *Id.* 490.) These cases in the discretion of the court are often very embarrassing and difficult; but it is held that the public has an interest in them, and that the parties cannot be their own judges, but that the court must decide when so many interests are involved. (*Vide Inskip v. Inskip*, 5 *Iowa R.* 204.)

In the State of New York it has been decided that the supreme court has no inherent power to declare a marriage contract void, or to decree a limited or an absolute divorce. Whatever power it possesses is given by statute; and it can exercise no power on the subject of divorce except what is expressly specified in the statute. Therefore, it was held, that the court has no jurisdiction to declare a marriage void on the ground that a decree for divorce was obtained against the defendant by her former husband for adultery, in which decree she was forbidden to marry again until her said husband should be dead, and that, in disobedience of this provision, she and the present plaintiff went to another state and were there married. (*Peugnet v. Phelps*, 7 *Am. Law Reg. [N. S.]* 124. *S. C.* 48 *Barb. R.* 566.)

§ 681. In a majority of the states of the Union, the causes for a divorce *a vinculo matrimonii* are quite limited, but they have in addition to this what is called a divorce *a mensa et thoro* or "from bed and board." This process does not make the marriage void *ab initio*, nor does it dissolve the relation of husband and wife. It simply operates to separate the parties and in most other respects the marriage relation remains *intact*. Very strong objections have been urged against this judicial separation, and in several of the states the distinction between divorces *a mensa et thoro* and *a vinculo matrimonii* is no longer kept up. Such is the case in Vermont, Connecticut, Ohio, Indiana, Missouri, Iowa, Minnesota, Nebraska, Nevada, Oregon, and perhaps in some others. While in New York, Massachusetts, New Jersey, Michigan, Ken-

tucky, Mississippi, Louisiana, North Carolina, and others, divorces *a mensa et thoro* are granted for the usual common law causes and causes specified in the statute, such as cruelty, willful desertion, refusal to provide for the wife and the like. (*Vide the statutes of the several states.*)

The policy of these limited divorces is indeed questionable. They place the parties "in the undefined and dangerous characters of a wife without a husband and a husband without a wife," and "in a situation where there is an irresistible temptation to the commission of adultery, unless they possess more frigidity or more virtue than usually falls to the share of human beings." It is not necessary to dwell upon this species of divorce in this place, as the remarks which have been made respecting cruelty, desertion and the other causes specified, where they are grounds of divorce *a vinculo matrimonii*, are equally applicable to the subject where they are grounds of divorce simply *a mensa et thoro*.

CHAPTER XLIII.

THE ACTION FOR DIVORCE—THE LAW OF DOMICILE—THE DEFENSE TO THE ACTION—CONNIVANCE—CONDONATION—RECRIMINATION—WIFE'S ADVANCES PENDING SUIT.

§ 682. THE proceeding in this country to procure a divorce, either *a vinculo matrimonii*, or *a mensa et thoro*, is by process in a court of equity, or, in those states where law and equity are administered by the same tribunal, by the usual process in an action at law. Where the action is instituted by the husband against the wife, the process is similar to that of an action between other parties, except that the wife must appear and defend by guardian; and if the action is brought by the wife, the process is the same as in other cases, except that the plaintiff prosecutes by *prochein ami*, or by guardian, although by the codes of practice in several of the states the wife may prosecute or defend alone, when the action is for a divorce. If the parties are minors, plaintiff or defendant, there must be a *prochein ami*, or guardian, as the case may be, the same as in other cases where the parties are infants. (*Wood v. Wood*, 2 *Paige's Ch. R.* 108. *But vide Jones v. Jones*,

18 *Maine R.* 308.) In no case can a divorce be allowed except the husband and wife be both parties to the action, the one as plaintiff and the other as defendant, and in some of the states it is required that the libellant or plaintiff shall sign the petition or process personally, and not by attorney. (*Vide Philbrick v. Philbrick*, 27 *Vt. R.* 786. *Winslow v. Winslow*, 7 *Mass. R.* 96. *Gould v. Gould*, 1 *Metc. R.* 382.) The statute of Massachusetts requires that "every libel shall be signed by the libellants, if of sound mind and of legal age to consent to marriage; otherwise it may be signed by his or her guardian, or by any person admitted by the court to prosecute the same as next friend of the libellant." (*Gen. Stat. ch.* 107, § 16.) In case either party is insane, of course the insane person must prosecute or defend by guardian, *prochein ami*, or committee. But, as a general thing, the practice, in case the parties are infants, insane or laboring under other disability, is regulated by statute, and therefore the local statutes of the state must be consulted in order to determine the rule. It is obvious that there may be cases where a divorce should be procured, even in behalf of a person who is insane at the time of the decree, or against a party who is in like manner insane, and provision is made for the action in such cases. (*Vide Crump v. Morgan*, 3 *Ired. Eq. R.* 9. *Brown v. Westbrook*, 27 *Ga. R.* 102. *Clement v. Mattison*, 3 *Rich. R.* 93. *Montgomery v. Montgomery*, 3 *Barb. Ch. R.* 132.) The way and manner of obtaining jurisdiction of the person of the defendant in divorce cases is the same as in other cases. It is important and requisite that the defendant have notice of the proceeding, and an opportunity to defend the action, before a decree passes against him; and, as a general rule, if the process by which the action is commenced is not personally served on the defendant, the divorce would be irregular. (*Randall v. Randall*, 7 *Mass. R.* 502. *Labotiere v. Labotiere*, 8 *ib.* 383. *Schetzler v. Schetzler*, 2 *Edw. Ch. R.* 584. *Phelps v. Phelps*, 7 *Paige's Ch. R.* 150. *Townsend v. Townsend*, 21 *Ill. R.* 540. *Smith v. Smith*, 20 *Mo. R.* 166. *Welch v. Welch*, 16 *Ark. R.* 527.) It will not be sufficient to leave the process at the usual place of abode of the defendant, the defendant being absent at the time. (*Randall v. Randall*, *supra*. And *vide Smith v. Smith*, 9 *Mass. R.* 422. *Alexander v. Alexander*, 2 *Swab. & Tris. R.* 95.) This is the general rule where the party to be served is within the jurisdiction of the court; but where the defendant is absent from the

state in which the action is brought, provision is usually made by statute for a substituted service of the process, by publication or the like. In all these cases the provision of the statute must be strictly pursued. (*Smith v. Smith*, 4 *Greene's [Iowa] R.* 266. *Jenne v. Jenne*, 7 *Mass. R.* 94. *Ditson v. Ditson*, 4 *R. I. R.* 87, 102, 103. *Vide Bachelor v. Bachelor*, 1 *Mass. R.* 256.)

§ 683. But a very nice question is often presented as to the extent to which a court of a sister state may have power to dissolve the marriage relation, for any cause not arising within the jurisdiction of the court, or while the parties were domiciled within that jurisdiction. In respect to this it has been laid down as a principle of general law, that the jurisdiction over causes of divorce depends, primarily at least, upon the domicile of the parties at the time such alleged cause occurred; but it is not indispensable that the act should, in all cases, have occurred within the local jurisdiction; if it occur elsewhere, while the parties, or one of them, is temporarily abroad, it will be referred to the place of the fixed domicile of the parties, and will then have the same effect as if committed within that jurisdiction. (*Dorsey v. Dorsey*, 7 *Watt's R.* 349. *Brett v. Brett*, 5 *Met. R.* 233.) Judge Story says: "The doctrine now firmly established in America upon the subject of divorce is, that the law of the place of the actual *bona fide* domicile of the parties gives jurisdiction to the proper courts to decree a divorce for any cause allowed by the local law, without any reference to the law of the place of the original marriage, or to the place where the offense for which the divorce is allowed was committed." (*Story's Conflict of Laws*, § 230. *Vide also Tolen v. Tolen*, 2 *Blackf. R.* 407. *Fellows v. Fellows*, 8 *N. H. R.* 160. *Furman v. Furman*, 3 *West. Law Jour.* 475. *Maguire v. Maguire*, 7 *Dana's R.* 181. *Harrison v. Harrison*, 19 *Ala. R.* 499.) And Hosack observes that this doctrine "seems to be at once the most equitable in itself, and to afford the best guaranty of the *bona fides* of the parties in seeking a judicial dissolution of the marriage." (*Hosack's Conflict of Laws*, 286.) This seems to be the rule in England. "A suit to dissolve the tie of marriage ought to be entertained only by the courts of the country in which the parties whose marriage is to be dissolved are *bona fide* domiciled according to the well known law by which the succession to movable estate is regulated in cases of intestacy" (*Fraser's Conflict of Laws in cases of Divorce*, 10.)

In several of the American States, statutes exist giving the courts, in express terms, jurisdiction to grant divorce for causes accruing out of the state, and while both parties were domiciled in another state; but as a general rule the courts have no jurisdiction over a divorce case, regardless of the place where the cause accrued, except one of the parties at least, has an actual and *bona fide* residence within the territorial jurisdiction of such courts; it is sufficient, however, if one of the parties is domiciled in the state where the proceedings are instituted. It may also be laid down as a general rule that the courts have no jurisdiction to grant divorces for causes accruing out of the state, when such causes would not afford just ground for dissolving the marriage relation, if they had accrued within the state. Undoubtedly a state might allow its courts to grant such divorces to persons domiciled there, but they would have no effect in any other forum, than in that in which they were granted. The subject-matter of a divorce suit is the act which constitutes the cause of action, and that must be a breach of the law of the state where the parties are domiciled at the time it occurs; or it must be an act which is a cause for a divorce in the state where the plaintiff resides at the time of the suit. For instance, cruelty or desertion is made ground of divorce *a vinculo* in several of the states, but the divorce will not be granted in any state where such act is not a ground of such divorce, though the cause of action may have accrued in a state where it was ground for divorce. But if the action is brought in a state where the act is ground of divorce, it will be granted, though the cause of action arose in a state where it was not a ground of divorce. Mr. Bishop says this is the universal doctrine, and that it prevails alike in the English, Scotch and American courts. (2 *Bishop on Marriage and Divorce*, § 171, referring to 1 *Burge Col. & For. Laws*, 680. 1 *Fras. Dom. Rel.* 658. *Duntze v. Levett*, *Ferg. R.* 68. 3 *Eng. Eq. R.* 360, 379. *Harding v. Alden*, 9 *Greenl. R.* 140. *Clark v. Clark*, 8 *N. H. R.* 21. *Harteau v. Harteau*, 14 *Pick. R.* 181. *Thompson v. The State*, 28 *Ala. R.* 12. *Hanberry v. Hanberry*, 29 *ib.* 719. *Ratcliff v. Ratcliff*, 1 *Swab. & Tris. R.* 467, 470. *Brodie v. Brodie*, 2 *ib.* 259.)

§ 684. But exception has been taken to the doctrine of the last section that the place where the offense was committed is immaterial. Mr. Bishop thinks there is no conflict of authority upon the point, but Judge Redfield, one of the learned editors of the

American Law Register (new series), in a very able article, published in that periodical under the head of "Conflict of Laws affecting Marriage and Divorce," says: "The validity of wills, and the rules of divorce, so far as personalty is concerned, depend upon the domicile of the decedent at the time of the decease; and the courts of the place of domicile have the exclusive jurisdiction to determine what the law is upon these points, and the decision of any other court, not having the proper jurisdiction in these questions, is of no validity. This has too often been decided, and there is too little question upon the point to justify the citation of authorities in regard to probate proceedings. And the course of decision is equally uniform in regard to decrees of divorce. The cause of action is entirely local, depending upon the violation of the law of the place of domicile at the time, and can only be enforced in that forum and under that law, the same as any other corrective penal consequence.

"We may therefore conclude, we think, that when any court attempts to take cognizance of an action for divorce, based upon facts accruing while the parties were domiciled without the forum, they are acting wholly without jurisdiction. Such acts could not be a violation of the laws of any state where the parties were not domiciled. For, if they could be so viewed, they might equally be regarded as a violation of the laws of *all other states*, and there would be no security. An act which, according to the law of the place of domicile, was indifferent, or to which no penal consequences attached at the time of perpetration, if it could be treated as a violation of the laws of all foreign states, or of the contract of marriage, and of its duties and obligations, as construed, measured or defined by the laws of all other states, might become the instrument of forfeiting the most important and vital interests pertaining to social life. The absurdity of such a construction is too glaring to require illustration. To be consistent, foreign courts, if they assume to take jurisdiction of causes of divorce, accruing while the parties were domiciled abroad, ought to judge the matter according to the law by which the parties were governed at the time of the commission of the acts. * * * No court, in any civilized country, would presume to determine the rights of the parties, in relation to torts or breaches of contract, by a law to which they owed no allegiance, and to which they had no reference, even in intent, at the time the facts occurred. And it would

be an equal violation of principle to apply any different rule to causes of divorce from what is of universal application to all transitory causes of action, when a cause of divorce is attempted to be determined in another forum." (3 *Am. Law Reg. [N. S.]* 207, 208, 209.)

The reasoning of Judge Redfield is certainly sound, and is in strict accordance with the decisions of England and most of the American States; the contrary doctrine has only been held in an occasional state. It may, perhaps, be regarded as the general rule, having its exceptions in few states, that one state will not attempt to enforce the laws of another in regard to the grounds of granting divorces *a vinculo*; nor will one state attempt to grant divorces of that character, for causes accruing while the parties were domiciled in another. (*McDermott's appeal*, 8 *Watts & Serg. R.* 251. *Edwards v. Green*, 8 *La. An. R.* 317. *Hare v. Hare*, 10 *Texas R.* 355, 357.)

§ 685. With very few exceptions, the courts of no state will grant a divorce in favor of a party who is not at the time a *bona fide* resident of the state; and in most of the states the statute requires that the complainant shall be a resident of the state a certain specified length of time before the courts can take cognizance of his case. Thus, in Connecticut, the petitioner must have steadily resided in the state three years next before the date of the petition. (*Vide Sawtelle v. Sawtelle*, 17 *Conn. R.* 284.) In Iowa, the petitioner must have been for the last six months prior to presenting his petition a resident of the state, or he can take nothing by his petition; and the residence must be intended as a permanent one, and not merely a temporary sojourn for six months. (*Hinds v. Hinds*. 1 *Iowa R.* 36, 49.) In Illinois, no person is entitled to a divorce under the provisions of the statute who has not resided in the state one whole year previous to filing his or her bill or petition. unless the offense or injury complained of was committed within the state, or while one or both of the parties resided in the state. (*Vide Ashbaugh v. Ashbaugh*, 17 *Ill. R.* 476.) In the State of Pennsylvania, no person is entitled to a divorce from the bond of matrimony who is not a citizen of the state, and who shall not have resided therein at least one whole year previous to the filing of his or her petition or libel. In Kentucky, suits for divorce must be brought in the county where the wife usually resides, if she has a residence in the state; if not, then in the

county of the husband's residence; and no such suit can be brought by one who has not been a continual resident of the state for a year next before its institution. (2 *Rev. Stat.* p. 17, art. 3, § 4.) In Tennessee it is provided by statute that "no person shall be entitled to a divorce from the bond of matrimony, by virtue of this act, who is not a citizen of this state, and who has not resided therein at least one whole year previous to filing his or her petition." (*Vide Person v. Person*, 6 *Humph. R.* 148. *Fickle v. Fickle*, 5 *Yerg. R.* 203.) And without occupying space with this matter, it may be affirmed that in all or nearly all of the remaining states, the plaintiff must be an actual and *bona fide* resident of the state, and must have been such resident for a specified time before commencement of the suit, in order to obtain a sentence of divorce.

As a general rule the practice is the same in actions for a divorce *a mensa et thoro* as in those for the divorce *a vinculo matrimonii*, and all of the principles governing the proceedings and the parties are similar in both cases; so nearly so, at all events, as to render it unnecessary to point out in this place the slight difference which may exist in some localities. What has been said therefore in respect to the divorce *a vinculo* may be generally and in most particulars applied in case the proceeding is for a divorce *a mensa et thoro*.

§ 686. The pleadings, practice and evidence in a divorce suit, are in some respects peculiar, and much may be said upon the subject, but it is not consistent with the objects of this treatise to enter upon the discussion here; generally the process and proceedings in divorce cases are the same as those in other cases on the equity side of the court. There is this peculiarity, however, which may be noted in a word, that the decree will never be granted except upon evidence; and never upon the admissions of the party. Although the suit may go by default, the plaintiff must prove his or her case. The defenses, however, which may be set up in bar of a divorce, should be briefly stated. One defense which is available in all divorce causes is the connivance or corrupt consent of the complainant to the offense charged upon the party accused. In such a case, "the rule of law comes in that *volenti non fit injuria*, no injury has been done, and therefore there is nothing to redress." (*Forster v. Forster*, 1 *Hag. Con. R.* 144.) What is sufficient proof of connivance or collusion to bar the divorce is sometimes attended with difficulty, because the *intent* of the party

enters largely into the subject. "Different men have different degrees of judgment, and judge differently, nor are we to judge by the event. A court of justice must look *quo animo* the step is taken." (*Hoar v. Hoar*, 3 *Hag. Ec. R.* 137. *Moorsom v. Moorsom*, *Ib.* 87. *Turton v. Turton*, *Ib.* 338.) Lord Stowell remarked: "It is true, a husband is not barred by a mere permission of opportunity for adultery, nor is it every degree of inattention on his part which will deprive him of relief; but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of the wife take its full scope; but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution." (*Timmings v. Timmings*, 3 *Hag. Ec. R.* 76. *And vide Phillips v. Phillips*, 1 *Rob. R.* 144.) And Dr. Lushington said that the court could conceive of a case that might "arise of such willful neglect or rather exposure, as might, without proving actual connivance, possibly bar the husband of all remedy by a divorce. A husband might introduce his wife to society so abandoned, and expose her to risks so great, as to render a deviation from the paths of chastity the most probable if not the necessary consequence. Under such circumstances perhaps the court would not wait for proof of actual connivance on the part of the husband, but would hold him to the consequences of his own conduct, where the adulterous connection arose from the society and temptations to which he had introduced his wife." (*Harris v. Harris*, 2 *Hag. Ec. R.* 376.) It is doubtful whether any mere *negligence* or *carelessness* on the part of the plaintiff would be sufficient to bar the divorce, unless it was of such a nature as to lead to the conclusion that it was *intended* to effect the result. Connivance is from the Latin *conniveo*, literally to wink, to close the eyes upon a fault, or to forbear to see it, to wink at it; but generally there must be some overt act of the party, at least an *intent* to effect the result; connivance of this character destroys all claim to remedy by way of divorce, on the obvious principle that no man has a right to relief from a court for an injury which he was chiefly instrumental in effecting himself. A man must come with pure hands himself in this respect, before he can expect due purity on the part of his wife, and the same may be said of the wife. The petition for divorce will always be dismissed when it appears that the offense complained of was procured through the positive, intentional instru-

mentality of the complainant. (*Myers v. Myers*, 41 Barb. R. 114, 120. *Timmings v. Timmings*, 3 Hag. Ec. R. 76.) Sometimes this is provided by the statute, and the divorce is denied unless it appears that the act charged was "committed without the consent, connivance, privity or procurement of the plaintiff," and this is what is usually understood by *connivance* which is a bar to the action of divorce.

§ 687. Another defense to the action for a divorce is what is called condonation or the forgiveness of the offense charged as the cause for the divorce. The connivance of the party is a bar, because no injury has been sustained by him; and condonation is a bar, because the injury is forgiven.

The definition, as given by the decisions, is "a blotting out of the offense imputed, so as to restore the offending party to the same position he or she occupied before the offense was committed;" and Lord Chancellor Chelmsford, while assenting to the correctness of the definition, said: "I think that the forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation, and that this must be shown by the re-instatement of the wife in her former position, which renders proof of conjugal cohabitation or the restitution of conjugal rights necessary." (*Keats v. Keats*, 1 Swab. & Tris. R. 334, 346, 357. *And vide Ratcliff v. Ratcliff*, *Ib.* 467, 473.)

Mr. Bishop gives the definition thus: "Condonation is the remission of a matrimonial offense known to the remitting party to have been committed by the other, on the condition subsequent that ever afterward the party remitting shall be treated by the other with conjugal kindness." (2 *Bish. on Mar. and Div.* § 34.) But, without seeking for any hypercritical meaning of the word, it is enough to say that condonation is the full and free forgiveness of the offense which is the ground of the application for a divorce; and, of course, there can be no condonation, unless there is an offense, nor unless the party has knowledge that the offense has been committed.

Condonation may be expressed, or it may be presumed from the conduct of the parties. There may be positive evidence of the reconciliation of the parties; or the forgiveness of the offense by the party injured may be implied by the cohabitation of the parties, with a full knowledge of the facts by the party aggrieved. Condonation is usually established by proof of cohabitation; and,

where a man and wife live together in the same house, the presumption is that they were on terms of matrimonial cohabitation. (*Beebe v. Beebe*, 1 *Hag. Ec. R.* 789, 796.) But, although condonation may be inferred from cohabitation, the presumption may be rebutted by proof of the accompanying circumstances, provided they are such as shall prove that, notwithstanding the parties dwell in the same house, they do not cohabit as husband and wife. (*Whispell v. Whispell*, 4 *Barb. R.* 217.)

Chief Justice Parsons said: "The true import of the rule, in my opinion, is, that the cohabitation of the husband, after the commission of the offense, and after *he believes*, on probable evidence, the guilt of his wife, is conclusive evidence of the remission. For he cannot be considered as having impliedly forgiven a crime which he does not believe to have been committed. And without that belief he cannot have knowledge of the crime; for he may have received the information without giving it credit." (*Anonymous*, 6 *Mass. R.* 147, 148.) It is often a difficult question to determine whether the cohabitation is after a knowledge of the offense. Said Lord Stowell: "A husband has suspicions; he has some intimations; he has enough to convince his own mind, but not enough to institute a legal case. In that distressing interval, his conduct is nice; and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and, if he continues cohabitation, it then becomes liable to that species of imputation which has passed to the disadvantage of this gentleman." (*Elwes v. Elwes*, 1 *Hag. Con. R.* 269, 292.) It is requisite that the complainant be not only morally satisfied of the guilt of his spouse, but that he should have such a knowledge of the fact as to justify him in seeking legal redress, before his cohabitation can be such evidence of condonation as to bar his divorce. Especially is this the rule, when the *wife* is the complainant; and it has been held that her cohabitation with her husband after his private confession to her of an act of adultery, but which she had no means of proving, so as to justify her in leaving his bed and board, and to protect her friends who might receive and harbor her against his will, is not such a condonation of the offense as will bar her suit for a divorce, upon a subsequent discovery of the means of establishing his guilt. (*Hofmire v. Hofmire*, 7 *Paige's Ch. R.* 60. And *vide D'Aquilar v. D'Aquilar*, 1 *Haggard's Ecclesiastical R.* 773.)

But that a condonation of the offense by the reconciliation of the parties, or a subsequent cohabitation with a full knowledge of the facts by the injured party, is a bar to a divorce, is recognized by the laws of most civilized countries. (*Johnson v. Johnson*, 4 *Paige's Ch. R.* 460, 469. *Burr v. Burr*, 10 *ib.* 20. *Martin v. Martin*, 15 *N. H. R.* 159, 160. *Wright v. Wright*, 3 *Texas R.* 168, 187. However, condonation is but a conditional forgiveness, and a repetition of the offense revives the condoned act; and in England it has been held that to revive a condoned adultery, it is not necessary that the new injury should be of the same nature; but that cruelty, desertion, or other improper conduct of the husband toward his wife, is sufficient for that purpose. (*Durant v. Durant*, 1 *Hag. Ec. R.* 745.) But in this country the principle of revival of the condoned offense, is only applied upon the commission of a new offense of the like nature, which would of itself entitle the injured party to a divorce. (*Johnson v. Johnson*, *supra*. But *vide S. C.* 14 *Wend. R.* 637. *Smith v. Smith*, 7 *Paige's Ch. R.* 434. *Whispell v. Whispell*, 4 *Barb. R.* 217.)

§ 688. The last general defense to an action for a divorce to be noticed is that of recrimination; that is, the guilt of the complainant of the same offense charged upon the defendant as the ground of divorce. The plaintiff, in this respect, must come into court with clean hands. This doctrine, said Lord Stowell, has its foundation in reason and propriety. It would be hard if a man could complain of the breach of a contract which he has violated; if he could complain of an injury, when he is open to a charge of the same nature. It is not unfit, if he who is the guardian of the purity of his own house has converted it into a brothel, that he should not be allowed to complain of the pollution which he himself has introduced; if he, who has first violated his marriage vow, should be barred of his remedy, the parties may live together, and find sources of mutual forgiveness in the humiliation of mutual guilt! (*Beebe v. Beebe*, 1 *Hag. Ec. R.* 789, 790. And *vide Mattox v. Mattox*, 2 *Ohio R.* 233.) And Chancellor Walworth declared that if both parties are guilty, neither has any claim to relief; and they are in that case suitable and fit companions for each other. (*Wood v. Wood*, 2 *Paige's R.* 108, 111.)

There is a variety of opinion and of practice as to whether a divorce should be barred by proof that the complainant is guilty of an offense which is made ground of divorce, but different from

the offense charged against the defendant. On this question Lord Stowell said: "It is certain that the wife has a right to say 'you shall not have a sentence against me for adultery if you are guilty of the same offense yourself.' The received doctrine of compensation would have this effect, because both parties are in *eodem delicto*; but this is not so in recrimination of cruelty; the delictum is not of the same kind. If the wife was the *prior petens*, in a suit of cruelty, I do not know that she would be barred by a recrimination of that species, for the consideration would be very different; the court might not oblige her to cohabitation which would be dangerous. Here the husband is a *prior petens* in a suit of adultery, and I take the general doctrine to be that a wife cannot plead cruelty as a bar to divorce for her violation of the marriage bed." (*Chambers v. Chambers*, 1 *Hag. Con. R.* 439. *And vide Cocksedge v. Cocksedge*, 1 *Robertson's R.* 90, 92.) In most of the states, if not all, this matter is regulated by statute. Sometimes it is provided that when both parties are guilty of the same offense neither shall be entitled to a divorce, and sometimes the provision is such that, where several offenses are equally ground of divorce, one offense may be set up in bar of a suit predicated upon another. Thus, in the State of New York, adultery is ground of a divorce *a vinculo*, and the statute provides that the divorce may be denied if it be proved that the complainant has also been guilty of adultery, under such circumstances as would have entitled the defendant, if innocent, to a divorce. (2 *Rev. Stat. part 2, ch. 8, tit. 3, § 42.* 2 *Stat. at Large*, 151.) In case of cruel and inhuman treatment by the husband of his wife, abandonment of the wife by the husband, or such conduct on the part of the husband toward his wife as may render it unsafe and improper for her to cohabit with him, entitles the wife to a decree of separation; and the statute provides that the defendant may be permitted to prove, in his justification, the ill-conduct of the complainant; and, on establishing such defense to the satisfaction of the court, the bill shall be dismissed. (2 *Rev. Stat. part 2, ch. 8, tit. 3, § 53.* 2 *Stat. at Large*, 153.) Here, in case the action is for an absolute divorce, the defendant can only recriminate by charging the same offense which is the subject of the plaintiff's complaint, while in case the application is for a divorce *a mensa et thoro* the defendant may recriminate the complainant by charging any ill-conduct on her part in bar of her suit.

In California it has been judicially declared that "the statute has specified certain acts or conduct which shall constitute grounds of divorce, and so far as the matrimonial contract is concerned, the courts cannot distinguish between them, whatever difference there may be in a moral point of view. The several offenses must, therefore, be held equally pleadable in bar to the suit for divorce, the one to the other, within the principle of the doctrine of recrimination." (*Conant v. Conant*, 10 Cal. R. 249, 256.) And the same doctrine has been enunciated in the State of Missouri. (*Neagle v. Neagle*, 12 Mo. R. 53. *Duncan v. Duncan*, *Ib.* 157. And *vide Harper v. Harper*, 29 *ib.* 301.) In some states the application for a divorce by the husband will be denied, though he prove the wife guilty, if it appear that he had deserted her or been guilty of other offenses which might not technically entitle her to a divorce *a vinculo* if she were herself innocent; and in North Carolina a divorce to the wife was denied on the ground solely that she had left her husband and refused to live with him before he committed the adultery for which she sought her divorce. (*Foy v. Foy*, 13 Ired. R. 90. And *vide Whittington v. Whittington*, 2 Dev. & Batt. R. 64.) And in the State of New York it was declared in one case that an absolute divorce should never be granted "except when the complaining party is entirely innocent, and is really aggrieved by the misconduct of the other, and seeks the relief which the law affords from a sincere desire to avoid a greater shame." (*Hanks v. Hanks*, 3 Edward's Ch. R. 468. And *vide Christianberry v. Christianberry*, 3 Blackf. R. 202. *Ryan v. Ryan*, 9 Mo. R. 539.)

§ 689. It has sometimes been decided that where the defendant recriminates the complainant as a bar to the action, it is not necessary for the defense to prove the recriminating charge by as strong evidence as would be requisite to convict the party on a direct proceeding for a divorce. (*Forster v. Forster*, 1 Hag. Con. R. 144. *Astley v. Astley*, 1 Hag. Ec. R. 714.) But there would seem to be no good reason for the distinction. It is true the plaintiff in a divorce case should come into court with clean hands, and be able to purge his own conduct of all reasonable imputation of guilt; still, every person is *presumed* to be innocent of a criminal charge until he is proved guilty; and therefore he *does* stand in court with clean hands, and free from the imputation of guilt until the *proof* establishes to the contrary. There certainly should be no presumptions indulged in against the complainant,

because the defendant is shown to be guilty of an offense which is the ground of divorce. In the first place, the *onus probandi* is on the plaintiff to establish the guilt of the defendant, but when this is established, the burden of proof shifts; and if the defendant seeks to deprive the plaintiff of his remedy by imputing a charge of criminality on his part, the charge should be made good by evidence which admits of no reasonable doubt. This would seem to be the reasonable view, and it is in accordance with the better authority. (*Vide Stone v. Stone*, 3 *Notes Cas.* 278. *Goodall v. Goodall*, 2 *Lee's R.* 384. *Turton v. Turton*, 3 *Hag. Ec. R.* 338, 350. *Sopwith v. Sopwith*, 2 *Swab. & Tris. R.* 160, 164.) In the last case cited, the judge ordinary remarked: "It is certainly a startling proposition that, if an issue be joined as to the same identical fact, a different amount of evidence is necessary to sustain the issue according as the averment of that fact is made by the plaintiff or defendant."

§ 690. It has also sometimes been questioned whether a condoned offense may be pleaded as a defense by way of recrimination. Upon this subject, Lord Stowell remarked: "A man, it is true, who has forgiven adultery, cannot bring a suit; but, where he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the court? Does her act bind the court? If both are equally guilty, will her condonation make him *rectus in curia*, and enable him to procure a sentence? There may be cases where a wife may, by forgiveness, by cohabitation, by the reformation of the husband, be so barred that an obsolete fact shall not be a defense. * * * It is said, that condonation is favored because it induces the parties to live together again; but here the effect would be to separate them, to shut the door more completely against a return; here, if the court does not pronounce a sentence of separation, is no impossibility of a return." (*Beebe v. Beebe*, 1 *Hag. Ec. R.* 789, 797.) But Dr. Lushington, in a subsequent case, said: "When a condonation has taken place, with a full knowledge of the facts, it is said to be a conditional forgiveness. Conditional on what? On the future conduct of the husband? Suppose he fulfills the condition, and never after violates the obligation of the marriage bed, is the condonation to have no other effect than to bar a suit against him? I think the effect is to make him *rectus in integer*, except that his past transgression may be revived by subsequent miscon-

duct." (*Anichini v. Anichini*, 2 *Curt. Ec. R.* 210.) The doctrine of Dr. Lushington was followed by Cresswell, J., in a later case before the new divorce court of England. (*Seller v. Seller*, 1 *Swab. & Tris. R.* 482. *But vide Goode v. Goode*, 2 *ib.* 253.) Sometimes this question is regulated by statute, and is, therefore, determined by the language of the provision making the recrimination a defense. Thus, in the State of New York, the recriminatory act must be proved to have been committed "under such circumstances as would have entitled the defendant, if innocent, to a divorce;" and it has been held that under this provision, as a condoned offense of the defendant will not entitle the complainant to a divorce, so a condoned act of a similar character on the part of the complainant will not bar the suit for a divorce. So that, when in a suit for a divorce on the ground of adultery, and the defendant makes a recriminatory charge in his answer, the offense of the plaintiff must be set up in the same manner, and be accompanied with the same allegations, as are required to be charged in a bill of complaint. (*Morrell v. Morrell*, 1 *Barb. R.* 318. *S. C.* 3 *ib.* 236.) But when the case was last before the court, some doubt was expressed as to whether that was the true construction of the statute. Sill, J., observed: "In giving construction to the forty-second section of the statute concerning divorces, the justice before whom this motion was argued at the special term, came to the conclusion that an adultery of a complainant condoned, was no bar to a suit for a divorce in his favor. That the circumstances under which the adultery must be committed, to constitute a bar under that statute, were absence of procurement or connivance of forgiveness, or a bar arising from lapse of time. Even upon this construction of the section, the plaintiff would not, in this case, be entitled to the issue to try the question of forgiveness. We are not, however, prepared to give our assent to this construction of the statute. It declares that the court may deny a decree for a divorce, 'when it shall be proved that the complainant has been guilty of adultery under such circumstances as would entitle the defendant, if innocent, to a divorce.' The circumstances meant are undoubtedly absence of procurement or connivance, or any thing else which would involve the other party directly or indirectly in the guilt of the act. But it seems to us that condonation and lapse of time (where they have transpired) cannot appropriately, and within the meaning of the statute, be taken as the circumstances under which a party is

guilty; they have no connection with the commission of the offense." (*Morrell v. Morrell*, 3 Barb. R. 236, 241, 242.) The point, however, was considered too important to dispose of upon special motion, and the question was left unsettled. But where there is no statute to control the question, it does not follow because a condonation or forgiveness by the complainant will bar a suit for a divorce, that it will have the same effect as a defense, by way of recrimination, set up by the defendant. That must depend upon the particular circumstances of the case. (*Wood v. Wood*, 2 Paige's Ch. R. 108.) The guilt of the plaintiff in a moral sense, is the same whether the offense has been condoned or not, and that is probably what the law intends to say shall prevent him from obtaining the divorce. (*Vide Leseur v. Leseur*, 31 Barb. R. 330. *Anonymous*, 17 Abb. Pr. R. 48. *B. v. B.* 11 N. Y. Leg. Obs. 350. *Masten v. Masten*, 15 N. H. R. 159.)

But Mr. Bishop says: "If we look at this question in the light of principle, we shall be led to the following result: After an offense has been condoned, the guilty one stands upright as to his relations with the other, so long as his own conduct is correct in all particulars, perhaps even when it is not fully correct. This places the forgiving party under no new liberty of evil doing; but suppose the condoned offense were to operate as a recriminatory bar, then the forgiving party would have practically obtained a license for himself when he suffered the condonation to pass. And surely any construction of either a common law or a statutory rule the effect of which is to license profligacy or other ill conduct in the matrimonial relation, is to be strenuously avoided." (2 *Bishop's Marriage and Divorce*, § 100.)

It may be suggested that, although the case should go by default, if it appears by the plaintiff's own showing that there is a good and valid defense to the action, the divorce will not be granted. (*Timmings v. Timmings*, 3 Hag. Ec. R. 76.)

§ 691. In the English ecclesiastical courts, the defendant may not only recriminate the plaintiff and show a competent wrong in him for the purpose of defeating his action for a divorce, but the defendant may also, in a proper case, obtain a divorce by the decree of the court in the same action. (*Vide Dysart v. Dysart*, 1 Rob. R. 106. *Clowes v. Clowes*, 3 Curteis' Ec. R. 185, 194.) And the same rule applies in many of the American States, sometimes by a cross-suit and sometimes by setting up the matters in the

answer, and praying for the affirmative relief desired. (*Vide McCafferty v. McCafferty*, 8 *Blackf. R.* 218. *Stafford v. Stafford*, 9 *Ind. R.* 162. *Birkley v. Birkley*, 15 *Ill. R.* 120. *Bogges v. Bogges*, 4 *Dana's R.* 307. *Anonymous*, 17 *Abb. Pr. R.* 48. *B. v. B.* 11 *N. Y. Leg. Obs.* 350.) In Indiana, the matter is regulated by statute, which provides that "the defendant may, in addition to his or her answer, file a cross petition for divorce, and the court shall in such case decree the divorce, if any, in favor of the party legally entitled to the same." (*Vide Stoner v. Stoner*, 9 *Ind. R.* 505, 506.) And in New York and several others of the states, their Code of Procedure provides that if it appears on the trial of a cause that the defendant is entitled to any affirmative relief, judgment must be given accordingly. Under such a provision there could be no doubt but a defendant in a proper case could have his divorce. But in all these cases where the defendant seeks a divorce by recrimination, he should set up in his answer all the facts constituting his claim for a divorce in the same manner, and it should be accompanied with the same allegations as are required when charged in a bill. (*Morrell v. Morrell*, 3 *Barb. R.* 236.)

§ 692. It has always been the practice in the ecclesiastical courts, in cases for divorce, to require the husband to advance the means to the wife to enable her to prosecute or defend the action, whether she be plaintiff or defendant; and this has also been the general practice of the American courts. Formerly it was usual to require this almost as a matter of course, but of late the rule has been relaxed. It is now held not to be a matter of right, under all circumstances, for the wife who has commenced a suit for a divorce or for a separation, or against whom the husband has brought his action for a divorce, to require the court to direct an allowance to be paid to her by the husband, plaintiff or defendant, for the purpose of defraying the expenses of the suit. When it is probable, however, that the wife may succeed in such action, and when it appears that she is destitute of the means of carrying on or defending the action, as the case may be, it is almost a matter of course, at the present day, to require the husband to make the wife a reasonable allowance for the necessary expenses of the suit, having a due regard to the value of his property, the amount of his income from his own exertions, and the necessary support of himself and others who have claims upon him for subsistence. And, as it would be improper for the wife to cohabit with her hus-

band during the pendency of the action, if she is unable to provide for her own subsistence, and he has the means of supporting her, it is also a matter of course to require him to contribute of those means to furnish her with the necessary clothing and subsistence, until it can be legally determined whether the charges preferred are true or false. But if the proofs presented on the application render it morally certain that the action brought by the wife will ultimately fail for want of merit; or if it is made to appear, when the action is brought by the husband, that the wife lived in adultery, or a life of prostitution, the allowance will not be made. (*Kock v. Kock*, 42 *Barb. R.* 515. *Jones v. Jones*, 2 *Barb. Ch. R.* 146. *Whitney v. Whitney*, 22 *How. Pr. R.* 175. *Carpenter v. Carpenter*, 19 *ib.* 539.)

It is not at all a matter of course to allow an advance to the wife on a bill filed by her for divorce *a mensa et thoro*, to enable her to prosecute her suit. Injury and a meritorious cause of action must be made to appear, and then a suitable allowance will be made. (*Worden v. Worden*, 3 *Edw. Ch. R.* 387.) Where the husband comes for divorce, and his wife denies on oath the charges made against her, he must supply money for temporary support, and to help the wife to make her defense; his poverty will not shield him; he must conform to the rule or abandon his suit. (*Purcell v. Purcell*, 3 *Edw. Ch. R.* 194. *Bruere v. Bruere*, 1 *Curt. Ec. R.* 566. *Walker v. Walker*, *Ib.* 560.)

Sometimes the matter of advances by the husband to the wife, to enable her to prosecute or defend the action of divorce, is regulated by statute; but, if there be no statute upon the subject, the allowance, in a proper case, will be made. (*North v. North*, 1 *Barb. Ch. R.* 241. *Mix v. Mix*, 1 *Johns. Ch. R.* 108. *Story v. Story*, *Walker's [Mich.] R.* 421. *Fishli v. Fishli*, 2 *Litt. R.* 337. *Amos v. Amos*, 8 *Green's Ch. R.* 171. *Patterson v. Patterson*, 1 *Halst. Ch. R.* 389. *Ryan v. Ryan*, 9 *Mo. R.* 539. *McGee v. McGee*, 10 *Ga. R.* 477. *Farwell v. Farwell*, 31 *Maine R.* 591. *Melizet v. Melizet*, 1 *Parson's R.* 78. *Ricketts v. Ricketts*, 4 *Gill's R.* 101. *Daiger v. Daiger*, 2 *Md. Ch. R.* 335. *Tayman v. Tayman*, *Ib.* 393. *Coles v. Coles*, *Ib.* 341.) In Connecticut, when the wife is respondent and defends herself against the application of her husband, the practice is uniform to order him to provide, in case of her inability, funds for her defense; but it seems that such aid is never furnished her when she is the prosecuting party. (*Shelton v. Pendleton*, 18 *Conn. R.* 417.)

CHAPTER XLIV.

THE DECREE IN A DIVORCE SUIT—ALIMONY AND THE RULES RESPECTING IT—THE EFFECT OF THE DECREE OF DIVORCE—VALIDITY OF FOREIGN DIVORCES—CONCLUSION.

§ 693. THE decree in a divorce suit is the sentence or judgment of the court, dissolving the marriage relation, or separating the parties from bed and board, as the case may be, and determining the incidental rights of the parties in respect to each other and to society. In England they have a statute which provides that "every decree for a divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the court shall by general or special order from time to time direct; and during that period any person shall be at liberty, in such manner as the court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not brought before the court; and, on cause being shown, the court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise, as justice may require." (23 and 24 Vict. ch. 144, § 7. And *vide Boulton v. Boulton*, 2 Swab. & Tris. R. 405. *Stoate v. Stoate*, *Ib.* 384. *Lewis v. Lewis*, *Ib.* 394.) But this practice does not generally obtain in the American States. The decree in the first instance is made absolute, although, for good cause shown, the court would open the decree and hear the cause further. If, however, the divorced party has married in the mean time, the case would have to be an extreme one for the court to interfere. (*Vide Olin v. Hungerford*, 10 Ohio R. 268. *Piatt v. Piatt*, 9 *ib.* 37. *Laughery v. Laughery*, 15 *ib.* 404. *Johnson v. Johnson*, Walk. [Mich.] R. 309. *Smith v. Smith*, 4 Paige's Ch. R. 432. *Dunn v. Dunn*, *Ib.* 425. *Colvin v. Colvin*, 2 *ib.* 385. *Bogges v. Bogges*, 4 Dana's R. 307. *Jeans v. Jeans*, 3 Harr. [Del.] R. 136. *Lucas v. Lucas*, 3 Gray's R. 136. *Sheafe v. Sheafe*, 9 Fost. R. 269. *Hoffman v. Hoffman*, 30 Penn. R. 417. *Mansfield v. Mansfield*, 20 Mo. R. 163. *Smith v. Smith*, *Ib.* 166.)

§ 694. The form of the decree is generally prescribed by statute. In cases of divorce *a vinculo matrimonii* the decree declares the

dissolution of the marriage contract, and further provides that the defendant is prohibited from marrying again until the complainant is actually dead, but permitting the complainant to marry again, the same as though the defendant was actually dead. The decree also regulates the question as to the custody of infant children, if the parties have any, and sometimes as to the property of the parties. (*Hansford v. Hansford*, 10 *Ala. R.* 561.) In some of the states, however, the dissolution of the marriage relation is absolute as to both parties, and they may both marry again, as though they had never before been married. In cases of divorce *a mensa et thoro* the decree provides for the separation of the parties and the support of the wife apart from her husband, and for the custody of the infant children of the parties, if they have any; and, as a general rule, when the wife succeeds in the action, the decree provides for the collection of her costs and expenses out of the husband, whether the case was for an absolute or limited divorce. (*Vide Graves v. Graves*, 2 *Paige's Ch. R.* 62.) In some cases, where the wife is defeated in her action for a divorce, her costs will be allowed against the husband. Thus, in a case before the Alabama courts, the learned judge said: "It was manifestly wrong to render a decree against her for costs in a suit prosecuted against her husband under any circumstances; but, in this case, the court is of the opinion that he should have been compelled, by the decree, to pay the same, as from the admissions of the answer it appears that she had probable cause for instituting her proceedings, although she may not have been able to prosecute the case to a successful issue." (*Richardson v. Richardson*, 4 *Porter's R.* 467, 478, 479.) But, however the case may be, the decree usually determines the question of the wife's costs, and oftentimes other incidental matters not necessary here to be noticed.

§ 695. It may also be affirmed as a general proposition, that when there is a separation decreed upon the application of the wife, alimony will be allowed if the wife asks it. Alimony in law is the allowance made to the wife out of the husband's estate or income, upon a decree of separation. This allowance is made upon the theory that the husband is bound to support his wife, and this obligation does not cease after her separation from him for causes originating with him after the marriage. "This alimony, in strictness of law, being a duty properly due from the husband to the wife during her cohabitation with him, the canon law says, that

if she does, without any default of his, of her accord, depart from him, he shall not be obliged to allow her alimony during such her willful desertion of him, though she be not charged with adultery, and though he had a considerable dowry with her. But if she departs from her husband through any default of his; as on the account of cruelty and the like, then he shall in that case be compelled to allow her alimony, though he had no dowry with her; for the law deems her to be a dutiful wife as long as the fault lies at his door." (*Ayl. Parer.* 58.)

When the wife is the offender and a divorce is granted on the petition of the husband, alimony is very seldom allowed. There may be circumstances attending such a case, however, when it would be but simple justice that the husband should be required to make a provision for her support; and where there is no statutory impediment the husband has been occasionally decreed to make such provision for his discarded wife; "and for this most just, humane and moral reason, that she may not be driven by want to continue in a course of vice." (*Jee v. Thurlow*, 4 *Dowl. & Ry. R.* 11, 17.)

"It is not too much to suppose," said Eastman, J., in a case in the supreme court of New Hampshire, "that there are those who would enter into the marriage relation solely with the view of possessing themselves of the property of their wives, and who would readily sacrifice their virtue, if by so doing they could break up the marriage contract, and at the same time retain the property of which she had gained possession. Nor is it too much to suppose that a weak-minded woman might become the victim of an artful and unprincipled husband; and yet in such a way that it would be impossible to produce any evidence implicating him in her fall. To cast such a woman destitute upon the world would be doing the grossest injustice, and at the same time be rewarding the most infamous iniquity." (*Sheafe v. Sheafe*, 4 *Fost. R.* 564, 568.) In a case in the late court of chancery of the State of New York, wherein the decree was against the wife on the petition of the husband, the late distinguished Chancellor Walworth said: "Although I am compelled to decree a separation in this case, I should not leave the future support of the wife, beyond what she is able to earn by her own exertions, wholly unprovided for, but should direct the husband to pay the same amount for her support which he has voluntarily paid, did I not doubt my power to make such a decree

against the husband." After referring to the statute and concluding that the alimony could not be allowed under its provisions, when the husband has obtained a decree of separation from his wife, on account of her own misconduct, the learned chancellor added, "I can therefore only recommend to him that he should hereafter allow her at the rate of three dollars a week, if he has the means of doing so, in addition to what she can earn by her own exertions, while she continues to provide for herself therewith, without being a charge upon any of her relatives or friends." (*Perry v. Perry*, 2 Barb. Ch. R. 311, 312, 313.)

In a case which arose under the New Hampshire statute upon the subject, Judge Bell said: "The ordinary course is to allow alimony to the wife, where she is the injured party and the libellant; but the power of the court is not limited to that case. The wife may be in the wrong. She may have an unhappy temper, or an unfortunate disposition; she may have ill-treated her husband, or deserted him, or have otherwise misconducted herself, and yet the property she may ask as alimony may be all such as has been accumulated, in whole or in part, by her own industry; and her fault may be far from such as ought to be punished by the forfeiture of all her property, or her interest in the husband's property, thus leaving her to beg or starve. She may have so conducted herself that her husband may be well entitled to a divorce, and yet she may be a wronged and injured woman; and there seems, therefore, to be good reason why the court should be vested with the power of making to her a just and reasonable allowance in any such case." (*Sheafe v. Loughton*, 36 N. H. R. 240, 243.) And several of the states have statutes under which the courts have granted an allowance from the husband's estate, notwithstanding the divorce was ordered on the complaint of the husband. (*Vide Pence v. Pence*, 6 B. Mon. R. 496. *Dailey v. Dailey*, *Wright's [Ohio] R.* 514. *McCafferty v. McCafferty*, 8 Blackf. R. 218. *Reavis v. Reavis*, 1 Scam. R. 242. *Richardson v. Wilson*, 8 Yerg. R. 67. *Lovett v. Lovett*, 11 Ala. R. 769. But *vide Oliver v. Oliver*, 5 ib. 75.) But the policy of allowing the delinquent wife alimony is quite questionable, although there may be circumstances which justify it.

§ 696. The question of alimony is not always a peremptory one; it is, in general, in the discretion of the court which grants the decree. In the State of New York, where a bill was filed by

the wife against her husband for a divorce *a mensa et thoro*, on the ground of cruel usage, the court, under the circumstances, decreed a divorce for five years, and required the husband to pay a certain sum per year, in half-yearly payments, for the support of the wife and the education and maintenance of their infant child; but the rule was declared that the licentious conduct of the wife, if existing prior to the alleged acts of cruel treatment by the husband, will destroy any just claim for maintenance. (*Bedell v. Bedell*, 1 *Johns. Ch. R.* 604.) But this discretion is a *judicial* discretion and not an arbitrary one; and, when the delinquency of the husband has been established, and the wife is the injured party, driven by his cruelty, for example, from the benefit of domestic enjoyments, the courts will always make the allowance. (*Burr v. Burr*, 7 *Hill's R.* 207, 211.)

The law has fixed no definite proportion of the husband's estate to be allotted to the wife in these cases for permanent alimony; therefore, the court is always required to look to all the circumstances of the particular case, as no two are alike, in order to award what is fair and just between the parties. The general rule is, that the wife is entitled to a support corresponding to her rank and condition in life and the fortune of the husband; and it seems to be a settled principle to make a more liberal allowance in case of aggravating circumstances in the conduct of the husband, and when no imputation exists against the wife, than in other cases. So, the amount is always influenced, more or less, by the fact that the husband has a family of children to support, or that he himself is in feeble health. In many cases, the third part of the annual income of the husband has been assigned as permanent alimony; in others, a moiety. (*Burr v. Burr*, *supra*.) If the parties are laboring people, the wife does not usually require as much as though she was brought up unused to labor, and this is taken into the account by the courts. If the husband is in good health and skillful, and is actually realizing considerable profits, it has been said that "the partner of his fortunes should not be refused a reasonable participation in them." (*Prince v. Prince*, 1 *Rich. Eq. R.* 282. And *vide Kirby v. Kirby*, 1 *Paige's Ch. R.* 261.) Dr. Lushington said: "I think that, with regard to permanent alimony, the court would make a different allotment in a case where the income of the husband was derived from his sole personal labor or exertions, from what it would do where he had moreover a large reversionary prop-

erty in expectancy." (*Stone v. Stone*, 3 *Curt. Ec. R.* 341.) Upon this subject, Mr. Bishop says: "If a wife has capacity to carry on business and to earn a livelihood, the husband has his rights concerning this capacity; if the wife has it, the wife has her corresponding rights; and, when alimony is to be decreed, whether between parties possessed of visible fortune or not, the respective capacities, as thus explained, should enter largely into the calculation. There are, undoubtedly, instances in which the wife's duty is to support wholly her husband by her own mental and physical exertions; and though, if he were delinquent in the duties of the marriage, on account of which she obtained a divorce from him, he would then have lost, by his own fault, his claim upon her, yet she would have no claim on him for alimony." (2 *Bish. Mar. and Div.* § 458.)

But it seems to be generally understood that at least one-third of the husband's income is the usual rate at which permanent alimony will be allotted, but it is liable to variation, according to the husband's ability to pay, and the conduct of the parties. The law, however, has laid down no exact proportion; it sometimes gives a third, sometimes a moiety, according to circumstances. (*Otway v. Otway*, 2 *Phillim. R.* 109.)

§ 697. It will be borne in mind that alimony is a provision or allowance for the maintenance of the wife, and it is not, therefore, a specified proportion of the husband's property set off, or given absolutely to her; but a specific sum secured to be paid periodically for her actual support; or it is sometimes an assignment to her separate use of such part of the real and personal estate of the husband as the court shall think fit. (*Magwire v. Magwire*, 7 *Dana's R.* 181. *Wallingsford v. Wallingsford*, 6 *Har. & Johns. R.* 485. *Purcell v. Purcell*, 4 *Hen. & Munf. R.* 507. *Russell v. Russell*, 4 *Greene's [Iowa] R.* 26. And vide *Rogers v. Vines*, 6 *Ired. R.* 293.)

The authorities are adverse to alimony being allowed to the wife for her natural life, for the husband may die before she does, and his duty to maintain her ceases on his own decease. (*Lockridge v. Lockridge*, 3 *Dana's R.* 28. *Logan v. Logan*, 2 *B. Mon. R.* 142. *Mayhugh v. Mayhugh*, 7 *ib.* 424.) The allowance is usually a specified sum, but the parties are at liberty to apply to the court at any time subsequent to the decree to have the allowance varied. (*Paff v. Paff*, *Hop. Ch. R.* 584.) Dr. Lushington

laid down the rule that "where there is a marital alteration of circumstances, a change in the rate of alimony may be made. If the facilities are improved, the wife's allowance ought to be increased; and, if the husband is *lapsus facultatibus*, the wife's allowance ought to be reduced. Applications of this sort are of rare occurrence." (*De Blaquiere v. De Blaquiere*, 3 *Hag. Ec. R.* 322. *Vide Westmeath v. Westmeath*, 3 *Knapp's R.* 42. *Pemberton v. Pemberton*, 2 *Notes Cas.* 17. *Cox v. Cox*, 3 *Add. Ec. R.* 276.) But, although the wife is at liberty to apply to the court for an increase of the amount allowed her as permanent alimony, on a change of circumstances, it is not every change which increases her expenses of living, that will entitle her to an increased allowance. For example, where her expenses have been increased by the addition to her family of a person whom the husband is under no obligation to support, the application for an increased allowance will not be granted, although the ability of the husband to pay may have been improved subsequent to the decree fixing the original amount. To increase the amount of her alimony merely on account of such expenses, would, in effect, compel the husband to support such third person as the wife might permit to eat up her own estate. (*Halstead v. Halstead*, 5 *Duer's R.* 659.) It is not denied, however, that there may be cases in which the improvement of the pecuniary condition of the husband subsequent to the decree of divorce, when considered in connection with the amount of alimony allowed by the judgment, and the social position of the parties, and their general mode of life previously, would make a further allowance just; but alimony is a maintenance to the wife, and the amount is always fixed with respect to that particular object.

§ 698. In a suit brought by the wife for a divorce she cannot, previous to the decree dissolving the marriage, make any valid agreement as to her allowance for alimony, and the court will not sanction any such agreement made by her, unless it satisfactorily appears that the allowance made in her favor for alimony is as much as she is fairly entitled to. After the bond of matrimony has actually been dissolved as to the wife, by a decree of court, she may make such arrangement as she pleases in regard to her alimony. (*Daggett v. Daggett*, 5 *Paige's Ch. R.* 509.) A wife, however, may compromise a suit brought by her against her husband for a divorce, and the court will only interfere so far as to see that

she is not overreached or imposed upon in the settlement. In such a case the parties may agree upon the allowance to be made by the husband, and the same will be sanctioned by the court, but a decree of divorce cannot be ordered in pursuance of any understanding between the parties, although, without doubt, many such decrees are entered, where the court has no knowledge of the collusion. (*Kirby v. Kirby*, 1 *Paige's Ch. R.* 565.)

It has been doubted even whether a wife would be bound by an agreement to relinquish her alimony after the decree of the court granting the divorce. Upon this subject, Dr. Lushington said: "I doubt whether, in law, it was competent for her, in that form, to relinquish the benefits of the decree of the court. This is a contract between husband and wife; and though the principles applicable to such contracts are not strictly the same after a legal separation as they may be regarded while the parties are living together, yet they are not widely different. In the one case, there is the influence arising from affection; afterward an influence of a different sort, arising from an anxiety to communicate with her children. If it were necessary to settle this point, I should be of opinion that the whole alimony decreed to her in 1830 must be placed at her disposal, and then she will be at liberty to appropriate it as she pleases." (*De Blaquiére v. De Blaquiére*, 3 *Hag. Ec. R.* 322.) It would seem that this was a case of legal separation merely; but when the divorce is from the bond of matrimony, the wife is free to act for herself, and is capable of modifying, or entirely relinquishing, the alimony decreed to her, provided it is based upon a valid consideration. (*Blake v. Blake*, 7 *Iowa R.* 46.)

The circumstances of the parties may sometimes so change subsequent to the decree as to justify a *reduction* of the allowance, although a reduction is very seldom made; and it has been held in some instances, that where a woman is divorced from her husband by reason of his adultery, her right to such suitable allowance as may be just, having regard to the circumstances of the parties respectively, as they exist at the time the decree is pronounced, is perfect and absolute; and that her subsequent misconduct no more impairs her right to it than such subsequent misconduct would impair her right to dower, or to a distributive share of her husband's personal estate, if he had died intestate, and no divorce had been pronounced; that her subsequent ill-conduct cannot be punished by a forfeiture of part of an allowance, just in itself, when fixed

and adjudged to her by reason of her husband's violation of legal duties. (*Forrest v. Forrest*, 3 *Bosw. R.* 661.) But if the pecuniary or physical condition of the parties should change subsequent to the decree, the case might be different, even though it may not concern her former husband or the court in respect to the way in which she spends her alimony. It was observed by the court in a Canada case: "Should any application be made to this court to reduce the allowance to the wife in consequence of the altered circumstances of the case, it will consider itself at liberty to consider the question anew, and to re-adjust the allowance proper to be made in the new state of affairs." (*Severn v. Severn*, 7 *Grant's U. C. Ch. R.* 109.) Alimony is fixed by the decree of the court, and the husband is required to give security for its payment, in such way as the court shall approve; and the court is not authorized to sequester the estate of the husband, appoint a receiver, and apply it to the payment of such allowance, until after making an order requiring the husband to give security for the payment of the allowance awarded to the wife in the decree, and the failure of the husband to perform it. And if security be given in such a case, by order of the court, for the payment of such allowance, the security must first be resorted to and exhausted before the estate of the husband can be sequestered. (*Forrest v. Forrest*, 9 *Bosw. R.* 686.)

If the husband should refuse to comply with the order of the court to give the security required for the payment of the alimony awarded, he may be attached and imprisoned as for a contempt of court. (*Graley v. Graley*, 31 *How. Pr. R.* 475.)

§ 699. With respect to the consequences which flow from the divorce it may be said, in general terms, that the effect of the decree, in the first place, is to place the parties in the condition therein expressed, and, as to third persons, their relation to the parties, in many particulars, may be determined by the provisions of the decree; but, in most respects, the effect of the decree of divorce is declared by law, irrespective of what appears upon the face of the judgment. The dissolution of the marriage relation, or the separation of the parties, and the right of either or both to marry again, are usually regulated by statute, though expressly provided for in the decree. If the divorce is absolute the decree dissolves the marriage, and declares that each party is freed from its obligations. The marriage contract, therefore, is at an end,

and both parties are absolved from all the obligations arising out of that contract. The relation of the parties, consisting of their mutual rights and duties, no longer exists, and the words husband and wife are no longer applicable to them. But for the prohibition of a statute, in such case, there would be no restraint upon either party as to a second marriage. The statute in most of the states prohibits the offending party from marrying again until the death of the other. The effect of the divorce upon the property rights of the parties and third persons is determined entirely by the law, and is seldom learned from the face of the decree. If the divorce is *a vinculo matrimonii*, things executed where the husband is seised in right of the wife are not avoided by the divorce; and if the common law prevails so that the husband becomes the owner of his wife's personal property, reduced to possession, his title to it remains undisturbed. (*Lawson v. Shotwell*, 27 *Miss. R.* 630, 636.) And, as a general thing, the husband would be entitled to take the emblements growing upon his wife's land at the time of the decree. (*Gould v. Webster*, 1 *Tyler's R.* 409. *Oldham v. Henderson*, 5 *Dana's R.* 254.) Usually, upon the dissolution of the matrimonial union, the inchoate right of curtesy and dower is at an end. (*Dobson v. Butler*, 17 *Mo. R.* 87. *Given v. Marr*, 27 *Maine R.* 212. *Clark v. Clark*, 6 *Watts & Serg. R.* 85, 88. *Levins v. Sleator*, 2 *Greene's [Iowa] R.* 604. *Cunningham v. Cunningham*, 2 *Ind. R.* 233. *Whitsell v. Mills*, 6 *ib.* 229. *Burdick v. Briggs*, 11 *Wis. R.* 126. *Rice v. Lumley*, 10 *Ohio St. R.* 596. *McCraney v. McCraney*, 5 *Iowa R.* 232. *Wheeler v. Hotchkiss*, 10 *Conn. R.* 225. *Barber v. Root*, 10 *Mass. R.* 260. *Renwick v. Renwick*, 10 *Paige's Ch. R.* 420, 424. *Burt v. Hurlburt*, 16 *Vt. R.* 292. *Boykin v. Rain*, 28 *Ala. R.* 332.) But in some of the states statutes exist providing that where the wife is the innocent party she shall, upon the dissolution of the marriage, become at once entitled to her dower. (*Smith v. Smith*, 13 *Mass. R.* 231. *Davol v. Howland*, 14 *ib.* 219. *Harding v. Alden*, 9 *Greenl. R.* 140.) If lands are conveyed to the husband and wife jointly, after a divorce *a vinculo matrimonii*, each takes a moiety, although before the divorce there were no moieties; after the divorce they would be tenants in common. (*Vide Ames v. Norman*, 4 *Sneed's R.* 687.)

Whether the provisions of marriage settlements can be enforced after an absolute divorce, does not seem to be definitely settled.

It was held in one case, "that a decree for a divorce *a vinculo matrimonii*, for the crime of the wife, annuls every provision made for a wife in marriage articles, or a marriage settlement in the nature of jointure, or otherwise, as well as any provision in articles executed upon a separation." (*Charraud v. Charraud*, 1 *N. Y. Leg. Obs.* 134. *And vide Hastings v. Orde*, 11 *Sim. R.* 205.) And in a case in Illinois, the court observed: "The marriage is dissolved, and all rights and obligations dependent on the existence of the marriage relation are extinguished. The parties are no longer husband and wife, but are permitted to marry at pleasure. The husband is released from all obligation to maintain the wife, and his right to her separate property is at an end. * * * It follows, that this suit cannot be maintained. The sole object of the agreement, so far as the wife was concerned, was to provide her a support as the widow of Somerville. Before any estate vested in the trustees, the marriage was dissolved, for her misconduct, and she ceased to be his wife. He was no longer legally or morally bound to support her, or to carry into effect any provision previously intended for that purpose. * * * If the estate had been conveyed to the trustee in pursuance of the agreement, it is possible that her right to receive the income would not be lost by the divorce." (*Clark v. Lott*, 11 *Ill. R.* 105. *And vide Cartwright v. Cartwright*, 19 *Eng. L. and Eq. R.* 46. *Albee v. Wyman*, 10 *Gray's R.* 222.)

After the dissolution of the marriage, the divorced husband and wife are competent witnesses for or against each other, except they cannot be permitted to reveal any thing which transpired between them in the confidence of the marriage relation. (*Barns v. Camack*, 1 *Barb. R.* 392. *The State v. Jolly*, 3 *Dev. & Batt. R.* 110. *Ratcliff v. Wales*, 1 *Hill's R.* 63. *Dickerman v. Graves*, 6 *Cush. R.* 308.)

It seems that after a divorce *a vinculo matrimonii*, the husband may maintain an action of criminal conversation against the man who debauched his wife during coverture, and the discarded wife is a competent witness to prove the criminal intercourse. (*Ratcliff v. Wales*, *supra*. *Dickerman v. Graves*, *supra*.)

§ 700. The effect of the divorce *a mensa et thoro* is quite different in many particulars from that of the divorce *a vinculo matrimonii*. In the former the parties continue to be husband and wife, and neither can marry again while the other lives. The

sentence of divorce *a mensa et thoro* does not so far destroy the relation of husband and wife as to make the latter a *feme-sole*; it merely suspends for a time some of the obligations arising out of that relation. (*Clark v. Clark*, 6 *Watts & Serg. R.* 85.) The divorce is only a legal separation, terminable at the will of the parties; the marriage continuing in regard to every thing not necessarily withdrawn from its operation by the divorce. (*Dean v. Richmond*, 5 *Pick. R.* 461, 468.) The rights of the parties as respects property, curtesy and dower remain unchanged, unless the rule is modified, as it sometimes is, by statutory enactment. In the State of Louisiana, however, the courts have held that such a divorce terminates all of the marital rights of the parties, and completely separates them, except that neither can marry while the other lives. (*Savoie v. Ignogoso*, 7 *La. R.* 281, 285. *But vide Gee v. Thompson*, 11 *La. An. R.* 657.) But the better authority is decidedly against this doctrine.

The right of the husband to the wife's choses in action after such a divorce, has sometimes been recognized at law; but "the rule of the court of equity in such cases follows that of natural justice; the husband by his violation of the marriage contract forfeits all equitable right to the wife's property. Even when the property has belonged to her before the separation, and has not been reduced into actual possession by the husband, courts of equity will restore it to the wife." (*Holmes v. Holmes*, 4 *Barb. R.* 295, 297. *And vide Van Duzer v. Van Duzer*, 6 *Paige's Ch. R.* 366. *Fry v. Fry*, 7 *ib.* 461. *Renwick v. Renwick*, 10 *ib.* 420.) In an early case after a divorce *a mensa et thoro*, an injunction was moved for to prevent the husband from selling a team belonging to the wife. The court was of the impression, first, that it should not be granted, because the marriage continued, and the husband had the same power over it as before the divorce; but, finally, upon due deliberation, it was held that, though the marriage continued notwithstanding the divorce, yet the husband did no act as a husband nor the wife as a wife; and the injunction was accordingly granted. (*Anonymous*, 9 *Mod. R.* 43, 44. 2 *Bright's Hus. and Wife*, 363.)

After the divorce *a mensa et thoro*, the husband is no longer liable for his wife's debts, contracted for necessities or otherwise; alimony is decreed for her maintenance and support, and that discharges the husband from such liability for her debts. (*Willson v. Smith*, 1 *Barn. & Ad. R.* 801. *But vide Keegan v. Smith*, 5

Barn. & Cres. R. 375.) Generally the wife, after a divorce of either kind, may do business upon her own account, and is liable upon her contracts.

§ 701. As a general rule, the sentence of divorce, when regularly and fairly obtained, is conclusive upon all parties, both at home and abroad. (*Barber v. Root*, 10 *Mass. R.* 260. *Wall v. Williamson*, 8 *Ala. R.* 48. *Wall v. Williams*, 11 *ib.* 826. *Hull v. Hull*, 2 *Strob. Eq. R.* 174, 177, 178. *Patterson v. Gaines*, 6 *How. U. S. R.* 550, 599.) But this rule has its exceptions, and depends upon many circumstances. Indeed the authorities are not entirely harmonious upon this subject. In England a suit was instituted in the arches court, in 1850, by the husband for restitution of conjugal rights. The parties, who were then Protestants, and members of the Episcopal church, the husband being a clergyman, were married in Philadelphia, and were residents of the United States, and afterward, embracing Catholicism, went to Rome and resided there, and the husband was ordained a priest of the Romish church. While at Rome, a rescript or decree of the authority of Rome was obtained, which was claimed and pleaded to be, in effect, a separation. Both afterward went to England, where the wife became a superioress of a convent. The court overruled the plea, and held that the parties were subject to the laws of Rome only while there, and that they did not carry that law with them into England. The court said: "We all know that in questions of marriage contract the *lex loci contractus* is that which is to determine the *status* of the parties." That "by consent of all nations, it is the *jus gentium* that the solemnities of the different nations with respect to marriage should be observed, and that contracts of this kind are to be determined by the laws of the country where they are made." (*Connelly v. Connelly*, 14 *Jur.* 437. *S. C.* 2 *Eng. L. and Eq. R.* 570.) Now, if it is implied that the contract shall not be dissolved by the courts of another state, except for causes allowed by the law of the state where it was made, a divorce by the courts of another state for any other cause would, perhaps, be impairing the obligation of a contract. But this contract is somewhat peculiar, and perhaps there is an implied agreement that the marital obligation shall always be regulated by the law of the state or country where the parties acquire a domicile; and their rights, duties, and obligations, from the relation of husband and wife, be defined by the municipal law of that domicile. The

validity of the marriage, of course, depends upon its conformity to the *lex loci contractus*. And, perhaps, if the parties are both residents of the same state, and intend to continue so, it is hardly reasonable to say that a marriage *in transitu* or *in itinere*, in another state, in which divorces are granted for minor causes, is an agreement that the marriage shall be dissoluble for those causes. Being a civil contract, it may be said, it is to be performed in any place where the parties shall afterward voluntarily reside, *animo manendi*. This is the judicial reasoning in a case before the supreme court of the State of New York, wherein it was held, that, where the parties, having a domicile in the state, were married there, and afterward the wife obtained a divorce *a mensa et thoro*; and still later, the husband went to Michigan and obtained a decree *a vinculo*, on a charge of willful desertion, the wife not having appeared, nor having notice, except by publication in a newspaper in the latter state; the divorce was a nullity; and the husband, having married again in the former state, the court granted a divorce on the petition of the wife, for adultery. (*Vischer v. Vischer*, 12 Barb. R. 640.) However, it was rather conceded, that a divorce granted by the court of a sister state, after appearance, or if the parties are domiciled there, after personal service, there being no fraud or collusion, would be conclusive in New York. And it may be doubted, in case of an appearance and litigation on the merits, whether proof of the domicile of the parties or the *lex loci contractus*, or the *locus delicti*, should affect the decree anywhere. But it is a sound principle of law, as well as of natural justice, that no person should be bound by a judgment without an opportunity of being heard; and there is no good reason why this rule should not apply in cases of foreign divorce. (*Borden v. Fitch*, 15 Johns. R. 121. *Bradshaw v. Heath*, 13 Wend. R. 407.)

§ 702. It has been held by the supreme court of the State of New York, that the legislature of a foreign state has no power to dissolve the marriage contract when the wife alone is resident within the state and subject to its jurisdiction, so as to affect rights of property in another state, where the husband is actually resident. Brown, J., who gave the opinion of the court at general term, said: "The contract of marriage is entire and indivisible, conferring rights and imposing obligations upon both parties. When the courts exercise the power of dissolving the contract and relieving

the parties from its obligations, they must have jurisdiction over both. They cannot, at the suit of one, entertain proceedings against the other for a dissolution of the contract, unless they have jurisdiction of such other, either by the serving of process or by voluntary appearance. Such an act—and there have been such acts—has been denounced as contrary to the first principles of justice. What cannot be done by the judicial power of a state, in this respect, is equally beyond the reach of the legislative power. If they may give effect to such legislation within their own borders, they cannot, certainly, thereby affect the rights of property of either party who are not, and where the property is not, subject to their jurisdiction. Under our laws, marriage is not a sacrament, but a civil contract, made like other contracts, with the consent of the parties, and upon sufficient consideration. Assuming that the husband is a citizen of one state and the wife resident within another, can a state legislature destroy or impair the obligation of the marriage contract by an act which takes the form of a law? Is not such an act within the spirit, if not the very letter of the constitutional provision which forbids a state to pass any law which impairs the obligation of contracts? *Quere.*" (*Todd v. Kerr*, 42 *Barb. R.* 317, 318, 319.)

Upon the effect of foreign divorces, the courts of New York have uniformly held the same doctrine from a very early period. In one case the parties were married in the state, in September, 1800; they resided in the state and lived together until the winter of 1802. In October, 1802, the wife went to Vermont for the express purpose of obtaining a divorce; in April, 1803, she returned to the State of New York, having in February preceding obtained a divorce, discharging her from the marriage contract and awarding her alimony against her husband. The ground upon which the divorce was granted was ill treatment and severity of temper; for which causes the laws of Vermont authorized a divorce *a vinculo*, when by the laws of New York, where the contract was entered into, and where the parties resided, no such divorce could be granted except for adultery. The supreme court held that the divorce in Vermont was a fraud upon the laws of New York, and was therefore a nullity. (*Jackson v. Jackson*, 1 *Johns. R.* 424.) In a later case, a similar decision was made where the husband obtained a divorce in Vermont, while his wife resided in New York, and it did not appear that personal notice of the pro-

ceeding in the Vermont court was given to the wife, although the law of Vermont only required notice in the newspapers; the supreme court of New York held that the divorce was void and not available for any purpose. (*Borden v. Fitch*, 15 *Johns. R.* 140. And *vide Bradshaw v. Heath*, 13 *Wend. R.* 407. *McGiffert v. McGiffert*, 31 *Barb. R.* 69.) A divorce obtained under similar circumstances was declared null and void in Massachusetts. The court said: "If we were to give effect to this decree, we should permit another state to govern our citizens in direct contravention of our own statutes, and this can be required by no rule of comity." (*Hanover v. Turner*, 14 *Mass. R.* 227, 231.) And in a late case a similar doctrine was declared, wherein Shaw, Ch. J., said: "Even before the Revised Statutes, upon general principles of justice and policy, such a decree would not have been held valid, but void, partly on the ground that it was a proceeding in fraud of our law, and partly because the court of the foreign state could have no jurisdiction of the subject-matter, and of both of the parties." (*Lyon v. Lyon*, 2 *Gray's R.* 369.)

§ 703. Upon this subject, it may be affirmed, that although the cases which have arisen in the American States are not entirely uniform, the better and prevailing doctrine is, that where the husband and wife are both residents of the same state, and one of them leaves the other and goes to another state, and in a suit brought there obtains a decree of divorce against the other, without any service of process upon, or notice to the adverse party, or appearance by the defendant, such decree will nowhere be recognized as of any validity outside of the state where it was granted. The court granting the divorce must have complete jurisdiction of the subject-matter, and of both the parties, or the decree is regarded as wholly inoperative out of the jurisdiction, whatever may be said of it within that jurisdiction. This rule has been settled by express adjudication in many of the states, and is just as binding in cases of divorce, as in any other case. "It is held that no state or nation has power to dissolve the marriage contract between citizens of any other state or nation, not resident or domiciled within its limits, for no nation could preserve its social order, if any other foreign state could, without its consent, dissolve or disturb that most important domestic institution of marriage." (*Maguire v. Maguire*, 7 *Dana's R.* 181. 2 *Kent's Com.* 117, 118, note. *Vide also Dunn v. Dunn*. 4 *Paige's Ch. R.* 425. *Lyon v.*

Lyon, 2 *Gray's R.* 367. *Dorsey v. Dorsey*, 7 *Watt's R.* 349. *Hull v. Hull*, 2 *Strob. Eq. R.* 174. *Irby v. Wilson*, 1 *Dev. & Batt. R.* 568. *Hartean v. Hartean*, 14 *Pick. R.* 181, 186. *Yelverton v. Yelverton*, 6 *Jur. N. S.* 24.)

§ 704. Much more might be said respecting the validity and effect of a divorce granted in one State where one or both of the parties are domiciled in another; but it is not considered necessary to pursue the subject any further in this place. Those who may desire more information upon the subject, or upon the general subject of marriage and divorce, than is contained in these chapters, are referred to the excellent work of Mr. Bishop on the law of marriage and divorce, which has been freely and profitably consulted in the preparation of these chapters upon the same subject.

And now this treatise on the law of infancy and coverture may be appropriately concluded. The materials are abundant for enlarging the volume, but they would not add essentially to its authority or value. The work is respectfully submitted to the candor of the profession, in the hope that it will prove both convenient and useful.

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